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RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

Concerning a Manufacturer's Advertising Plan
alleged to constitute Resale Price Maintenance
in the Distribution and Sale of certain
Household Appliances

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DEPARTMENT OF JUSTICE
OTTAWA

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EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1955.

RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

CONCERNING A MANUFACTURER'S ADVERTISING PLAN
ALLEGED TO CONSTITUTE RESALE PRICE MAINTENANCE
IN THE DISTRIBUTION AND SALE OF CERTAIN
HOUSEHOLD APPLIANCES

COMBINES INVESTIGATION ACT

Ottawa
1955



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RESTRICTIVE TRADE PRACTICES COMMISSION

C. Rhodes Smith, Q.C., M.A., LL.B., B.C.L.
Chairman

Guy Roberge, B.A., LL.B.
Member

A. S. Whiteley, B.A., M.A.
Member



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RESTRICTIVE TRADE PRACTICES COMMISSION

OTTAWA

October 17, 1955

Honourable Stuart S. Garson, Q.C.,
Minister of Justice,
Ottawa.

Sir:

I have the honour to submit to you herewith the report of the Restrictive Trade Practices Commission dealing with a manufacturer's co-operative advertising plan alleged to constitute a form of resale price maintenance in connection with the distribution and sale of certain household appliances.

The matter was brought before the Commission by the submission of a statement of the evidence obtained in the inquiry by the Director of Investigation and Research under the Combines Investigation Act and has been dealt with in accordance with the provisions of Sections 18 and 19 of the Act.

Evidence and argument in regard to the Statement of Evidence were heard by the Commission at Toronto on May 26 and 27, 1955, and at Ottawa on June 14 and 15, 1955. In these proceedings Messrs. J. D. Wentzell and F. N. MacLeod appeared on behalf of the Director of Investigation and Research and Messrs. J. D. Pickup, Q.C. and J. L. Ross appeared on behalf of the manufacturer and certain individuals.

Yours faithfully,

(Sgd.) C. R. Smith
Chairman

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CHAPTER I

INTRODUCTION

1. Reference to the Commission

This inquiry was brought before the Restrictive Trade Practices Commission under Section 18 of the Combines Investigation Act, R.S.C. 1952, Chapter 314, which reads as follows:

"18. (1) At any stage of an inquiry,

- (a) the Director may, if he is of the opinion that the evidence obtained discloses a situation contrary to section 32 or 34 of this Act, or section 411 or 412 of the Criminal Code, and
- (b) the Director shall, if so required by the Minister, prepare a statement of the evidence obtained in the inquiry which shall be submitted to the Commission and to each person against whom an allegation is made therein.

(2) Upon receipt of the statement referred to in subsection (1), the Commission shall fix a place, time and date at which argument in support of such statement may be submitted by or on behalf of the Director, and at which such persons against whom an allegation has been made in such statement shall be allowed full opportunity to be heard in person or by counsel.

(3) The Commission shall, in accordance with this Act, consider the statement submitted by the Director under subsection (1) together with such further or other evidence or material as the Commission considers advisable.

(4) No report shall be made by the Commission under section 19 or 22 against any person unless such person has been allowed full opportunity to be heard as provided in subsection (2)."

The Director of Investigation and Research under the Combines Investigation Act submitted to the Restrictive Trade Practices Commission a Statement of Evidence dated the 21st day of March, 1955, which contained the following allegations:

1. (a) That Moffats Limited, (sometimes referred to herein-after as "Moffats") being engaged in manufacturing, supplying and selling appliances, namely, electric and gas ranges, refrigerators, air-conditioners and washing equipment, directly and indirectly did require or induce or attempt to require or induce its dealers, particularly in the Provinces of Ontario and Quebec, during the years 1952 to June of 1954 (when this inquiry was initiated) by agreements, threats or promises to resell such appliances at prices specified or at prices not less than minimum prices specified by Moffats.

(b) That Moffats, during the said period, refused to sell or supply appliances to dealers for the reason that such dealers had refused to resell or offer for resale appliances at prices specified or at prices not less than minimum prices specified by Moffats.

2. That one of the methods employed by Moffats in attempting to require or induce its dealers to resell at prices specified by Moffats was to refuse to contribute to the advertising expenses of dealers who did not adhere to such prices while contributing to the advertising expenses of those dealers who did adhere.

3. That the action of Moffats, in making its contributions to advertising depend upon a dealer advertising at prices approved by Moffats, also constituted behaviour in contravention of Section 498A of the Criminal Code because Moffats, in effect, was granting to some dealers an allowance that was not available to competing dealers of Moffats who were not willing to conform with this illegal condition.

4. (a) That the actions alleged in paragraphs 1, 2, and 3 hereof were carried out by Moffats Limited by and through its officers, servants and agents, all of whom were acting in the course of their employment and within the scope of their authority as such officers, servants and agents.

(b) That H. C. Darroch, C. A. Winder, C. R. Smyth, J. O. Wilson, F. I. Yewman, M. C. Craft, E. R. B. DeGuerre and M. C. Staynor who were officers, servants or agents of Moffats Limited during the whole or part of the period mentioned in paragraph 1(a), were chiefly responsible for the actions so alleged.

At the same time that the Statement of Evidence was submitted to the Restrictive Trade Practices Commission, copies were sent by the Director to the corporation and individuals against whom allegations were made.

2. Legislation Affecting Resale Price Maintenance

Legislation affecting the practice of resale price maintenance was enacted at the Second Session of the Parliament of Canada in 1951, following and in accordance with recommendations made in an interim report on this subject by the Committee to Study Combines Legislation submitted in October, 1951.

The following definition of the practice was given in the Committee's interim report:

"By resale price maintenance we understand the practice designed to ensure that a particular article shall not be resold by retailers, wholesalers or other distributors at less than the price prescribed by the supplier, that is, in most cases, the manufacturer."

By Section 11 of Chapter 30 of the Statutes of Canada, 1951 (2nd Session) a new Section 37A was added to the Combines Investigation Act, which Section 37A was renumbered as Section 34 by Section 4 of Chapter 39 of the Statutes of Canada, 1952. This Section, which came into force on December 29, 1951, enacts as follows:

"34. (1) In this section 'dealer' means a person engaged in the business of manufacturing or supplying or selling any article or commodity.

(2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever require or induce or attempt to require or induce any other person to resell an article or commodity

- (a) at a price specified by the dealer or established by agreement,
- (b) at a price not less than a minimum price specified by the dealer or established by agreement,
- (c) at a markup or discount specified by the dealer or established by agreement,
- (d) at a markup not less than a minimum markup specified by the dealer or established by agreement, or
- (e) at a discount not greater than a maximum discount specified by the dealer or established by agreement,

whether such markup or discount or minimum markup or maximum discount is expressed as a percentage or otherwise.

(3) No dealer shall refuse to sell or supply an article or commodity to any other person for the reason that such other person

(a) has refused to resell or to offer for resale the article or commodity

- (i) at a price specified by the dealer or established by agreement,
- (ii) at a price not less than a minimum price specified by the dealer or established by agreement,
- (iii) at a markup or discount specified by the dealer or established by agreement,
- (iv) at a markup not less than a minimum markup specified by the dealer or established by agreement, or
- (v) at a discount not greater than a maximum discount specified by the dealer or established by agreement, or

(b) has resold or offered to resell the article or commodity

- (i) at a price less than a price or minimum price specified by the dealer or established by agreement,
- (ii) at a markup less than a markup or minimum markup specified by the dealer or established by agreement, or
- (iii) at a discount greater than a discount or maximum discount specified by the dealer or established by agreement.

(4) Every person who violates subsection two or three is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both."

This new section of the Combines Investigation Act forbids a manufacturer or other supplier from requiring or inducing, directly or indirectly, any other person to resell an article at a specified price or at not less than a minimum price, and makes it unlawful for a supplier to refuse to sell or supply an article or commodity to any other person for the reason that such person has resold or offered to

resell the article or commodity at less than a price specified by the supplier or has refused to resell or offer for resale the commodity at not less than a specified price.

3. Hearings and Witnesses

Hearings for the taking of evidence in the inquiry had been held, on application by the Director of Investigation and Research, before Mr. A. S. Whiteley, a member of the Commission, at Toronto, on September 22 to September 25, 1954, and at Hamilton, on October 4 and 5, 1954.

At Toronto the following witnesses were examined:

H. C. Darroch, Vice-President of Moffats Limited;
C. R. Smyth, General Sales Manager of Moffats Limited;
C. A. Winder, a former General Sales Manager for Moffats Limited;
J. O. Wilson, a former Ontario Divisional Sales Manager for Moffats Limited;
M. C. Staynor, Sales Representative of Moffats Limited, in Hamilton;
Miss F. C. Pargeter, Credit Manager for Moffats Limited;
E. R. B. DeGuerre, Sales Representative for Moffats Limited in the City of Toronto.

In addition to these officers, servants or agents of Moffats Limited,

George Reisman, President of George's Appliances Limited,
842 College Street, Toronto, Ontario, and
A. D. Lawson, proprietor of Lawson Appliances, Limited,
1640 Avenue Road, Toronto, Ontario,

gave evidence at the same hearings.

At Hamilton the following witnesses gave evidence:

M. J. Wasserman, Secretary-Treasurer of Ideal Furniture Limited;
T. Deloughery, Sales Manager of Ideal Furniture Limited;
L. Mitchnick, proprietor of King Appliances;
S. Smurlick, Secretary-Treasurer of Dominion Clothing and Furniture Limited;
M. Yolles, Vice-President of Home Outfitting Company, Limited;
N. Adler, President of Adler's Furniture House Limited;
E. C. Delorme, Sales Manager of Hurst Furniture and Radio Limited;
M. Zack, President of Zack's Powerhouse Limited;

- B. Wunder, President of Wunder Furniture Company, Limited;
J. A. H. Kay, Retail Advertising Manager of the Hamilton Spectator;
P. Rosenblatt, President and General Manager of Ontario Home Furnishings Limited;
B. Rosenblatt, President of Ottawa Furniture Company Limited.

In giving notice of the fixing of a time and place for the hearing of argument on the Statement of Evidence, the Commission informed the parties concerned that they would have full opportunity to be heard in person or by counsel, and that they would have the opportunity of further examining any witness who had been called during the course of the inquiry or of having called any additional witnesses or of submitting additional documentary evidence. At the hearings for argument which were held at Toronto on May 26 and 27, 1955, and at Ottawa on June 14 and 15, 1955, all the persons, save J. O. Wilson, named in the Statement of Evidence as having carried out or been concerned with alleged misconduct were represented by counsel, who made representations on their behalf at the hearings. At the hearing at Toronto, additional documentary evidence was received and E. R. B. DeGuerre, F. D. Pargeter, C. R. Smyth, M. C. Staynor, M. Wasserman and J. A. Deloughery were recalled as witnesses. In addition, the following witnesses were also heard:

- R. J. Barrie, salesman, Moffats Limited;
C. A. Marchant, salesman, Moffats Limited;
C. S. Lewis, President, New Era Home Appliances Limited;
M. Cohen, Manager, Better Appliances (Better Plumbing Company Limited);
I. Michaels, Michaels Appliances Limited;
L. U. Bunkowski, President, Bestway T.V. and Appliances Limited.

In order to avoid possibility of confusion in references to the evidence of various witnesses, testimony given at hearings in the inquiry will be cited as "Evidence, p.--" and before the Commission as "Transcript, p.--".

4. Position Taken with Respect to the Allegations by the Parties

In advance of the hearings before the Commission the parties were notified that they would be expected to state the position they were taking with respect to the statements of fact and conclusions made by the Director. At the opening of the hearings a brief was presented by counsel acting on behalf of Moffats Limited and the individuals named in the Statement of Evidence, except J. O. Wilson who was no longer employed by Moffats Limited. Issue was taken in this brief with all allegations in the Statement of Evidence and the reply

made may be outlined substantially as follows:

1. The evidence of dealers called in this inquiry is to the effect that Moffats Limited did not require or induce resale at specified prices or attempt to do so, or that Moffats Limited tried to establish a dealer's selling price. Other evidence of dealers is that they were free to sell at any price.

2. The evidence of dealers called in this inquiry in almost all cases shows no refusal by Moffats Limited to sell or supply appliances to their respective firms. The President of George's Appliances Limited, Toronto, gave evidence that apart from one occasion Moffats Limited did not refuse to sell or supply appliances to his company. The one occasion is explained on the evidence as an instance where Moffats Limited held orders for two or three days because of advertising by George's Appliances Limited which Moffats Limited considered misleading to the public. It appears from the evidence that George's Appliances Limited promoted a particular appliance in such a way as to create a public demand for it which could not possibly be supplied and continued such promotion while out of stock of such particular appliance. As the appliance in question was a last year's model and manufacture of it had been discontinued Moffats Limited were of the opinion that it should not be advertised in the public press as available when in fact there were not sufficient units to supply the demand. The franchise of one Hamilton dealer has been terminated for reasons unconnected with price, namely credit and availability of a larger and better dealer in the vicinity. Such other dealer had been under consideration for some time.

3. With respect to the allegation that Moffats Limited has contravened the provisions of the former Section 498A of the Criminal Code, it is intended to submit in reply that the same allowances were available at all material times to competing dealers in respect of sale of appliances of like quality and quantity. It is also intended to submit that any payments made or credits given by Moffats Limited to a dealer under the co-operative advertising scheme are in no sense discounts, allowances or price concessions. Such payments or credits represent reimbursement to the dealer for the share of Moffats Limited in the cost of advertising made jointly by Moffats Limited and the dealer. Such payments or credits are not related in any way to any particular purchases of the dealer. Moffats Limited advertises jointly with its dealers in advertising, which is not exclusively dealer advertising, up to 1-1/2% of a dealer's annual net purchases. In the Statement of Evidence herein the Moffat co-operative advertising scheme is inaccurately or incompletely referred to. Co-operative advertising did not depend upon adherence by dealers to Moffat suggested dealer selling prices and in fact the evidence herein discloses many examples of Moffats jointly advertising with a dealer where prices of appliances were advertised below the suggested dealer

selling prices. It is respectfully submitted that the evidence clearly establishes that the only significance of Moffat suggested dealer selling prices was to provide a base for the application of dealer discounts.

It is submitted that discounts and conditions of sale are common to all dealers of Moffats Limited.

4. It is clearly established by the evidence that Mr. Wilson as Ontario Sales Manager of Moffats Limited had authority to cancel a dealer franchise for any reason other than for selling at reduced prices. The evidence discloses that Mr. Wilson made a number of suggestions which were not adopted by his superiors and were not acted upon. The evidence also discloses that upon occasion Mr. Wilson acted beyond his authority and when in the witness box he admitted doing some things on his own.

5. Moffats Limited makes available to all its dealers a scheme known as co-operative advertising. The Company recognizes that much of a dealer's advertising promotes the business of the Company and its other dealers in addition to the business of the advertising dealer. This is not of course true of all the advertising made by a dealer as some advertising might adversely affect the business of the Company or its other dealers. In other words in some cases a dealer's advertising would promote only sales in his own store while in other cases where a dealer advertises in a newspaper widely distributed throughout Ontario his advertising might promote sales in stores of other Moffat dealers in Ontario. In such latter cases Moffats Limited is willing to share the cost of the advertising and to consider the advertisement to be joint advertising if in its opinion sales in other dealer locations might be promoted. Where the distribution of the advertising extends beyond Ontario, possible sales promotion might also be extended.

Moffats Limited will approve co-operative or joint advertising where the advertisement is designed to promote the sale of all its products. In other words Moffats Limited will pay one-half the cost of all dealer advertising which benefits Moffats Limited in any way which is additional to the promotion of sales through the particular dealer. It is company policy on the part of Moffats Limited to limit such joint advertising to an amount equal to one and one-half per centum of a dealer's net annual purchases. The advertisement to qualify as joint advertising must describe Moffat products constructively and correctly. Suggested co-operative advertising prices are issued from time to time and where an advertisement specifies an advertised price below such suggested co-operative advertising price, Moffats Limited will not share the cost of such advertisement if in its opinion such advertisement would not promote sales in other dealer locations. Although Moffats Limited does not share the cost of the dealer's advertisement, the dealer is nonetheless free to so advertise. It is company

policy not to share the cost of advertisements which might be detrimental to its business. There are many instances in the evidence of dealer advertisements at prices and in form and layout determined solely by the individual dealer and with respect to which Moffats Limited did not share the cost. All of the dealers called as witnesses who advertised extensively testified that co-operative or joint advertising was only a part, and in some cases only a small part, of their advertising program. With respect to their individual advertising such dealers testified that Moffats Limited did not interfere in any way and that the dealers were free to do as they wished.

6. The Director of Investigation and Research has failed to distinguish between the two offences created by Section 34 of the Combines Investigation Act and has thereby erred in his considerations and conclusions as to Moffat co-operative advertising. Under subsection (2) of the said section it is provided that resale price maintenance is an offence whether effected or attempted by agreement, threat or promise. The essence of the offence is an interference or attempted interference with respect to a sale required or induced by agreement, threat or promise. There can be no offence unless there is an interference or attempted interference with respect to a sale. It is respectfully submitted that advertising does not constitute a sale. It is respectfully submitted that no such agreement, threat or promise is established by the Statement of Evidence herein. Under subsection (3) thereof it is provided that it is an offence to refuse to sell or supply in certain circumstances. It is not made an offence to threaten to refuse to sell or supply. There must be an actual refusal. While advertising may constitute offering for sale within the meaning of the subsection, it does not do so in all circumstances. Examples of when advertising does not constitute an offering for sale are given in the evidence. In other words the evidence discloses that selling prices and advertising prices were not necessarily identical and on many occasions dealers sold at prices other than those advertised.

CHAPTER II

DISTRIBUTIVE ORGANIZATION AND DEALER ADVERTISING POLICY OF MOFFATS LIMITED

1. Organization of Moffats Limited

The following description of the corporative and sales organization of Moffats Limited is contained in the Statement of Evidence:

"9. Moffats Limited is incorporated under the Dominion Companies Act and has its head office in Weston, Ontario. In July, 1953, all its preferred and common shares were acquired by Avco of Canada Limited which was incorporated for that purpose. The latter company is a wholly-owned subsidiary of the Avco Manufacturing Corporation of New York. Moffats Limited manufactures and sells electric and gas ranges which were its original lines. Moffats Limited manufactures or assembles, and sells Crosley refrigerators, freezers and air conditioners under arrangement with Avco Manufacturing Corporation of New York. Moffats Limited also manufactures or assembles, and sells Bendix laundry equipment including automatic washers and dryers. Thermax Limited is a wholly-owned subsidiary of Moffats Limited, and is located in Orillia, Ontario. It manufactures and sells cooking equipment and it manufactures tubular elements for electric ranges which are manufactured and sold by Moffats Limited. The evidence in this inquiry does not relate to any of the above-mentioned companies except Moffats Limited and it relates chiefly to ranges and refrigerators.

10. The distribution set-up of Moffats Limited includes branch offices in Ontario, Quebec, Manitoba and British Columbia. Throughout the other provinces their merchandise is sold through independent distributors. The branch offices are located in Weston, Ontario; Montreal, Quebec; Winnipeg, Manitoba; and Vancouver, British Columbia. Their distributor in Alberta is the Motor Car Supply Company located at Calgary, while in Saskatchewan the distributor is Bowman Bros. Limited with head office in Saskatoon. Electrics Limited with head office in Halifax represents Moffats Limited in the four Maritime provinces (Evidence pp. 10-12).

11. The Moffat dealer organization is the responsibility of the General Sales Manager. He, however, normally delegates it to the Divisional Sales Manager. The company's Sales Representatives in selecting dealers make the contacts and do the spade work but the franchise has to be approved by the Divisional Sales

Manager. At that stage if there are any doubts as to the need or desirability of taking on a dealer the General Sales Manager's approval would be necessary as well. A dealer's potential sales volume and his credit are two important factors considered carefully by Moffats Limited before a dealer is enfranchised. In those provinces where Moffats Limited has no branch office, dealers are selected by the distributors. The franchise agreement between the distributor and dealer is very similar to the one used by Moffats Limited except that it stipulates the merchandise will be purchased from the distributor. The franchise is signed by the distributor but is approved by Moffats as well. Moffats Limited supplies the distributors with a liaison man to advise or help them in selecting new dealers. The distributors, however, are fully responsible for the credit of their dealers. The Moffat liaison man also assists the distributors with product presentation and advertising budgets (Evidence, pp. 12-18)."

2. Moffats Dealer Franchise Agreement

At the time of the hearings in this inquiry in September, 1954, Moffats Limited had prepared a new dealer franchise agreement which was about to be put into use. Two versions of franchise agreements were included among the exhibits as the forms which had been employed previously. The earlier of the forms had contained the following provisions:

"In consideration of and on acceptance of this application by Moffats Ltd. (hereafter called Moffats) we agree:-

1. To actively promote the sale of Moffats products at established retail prices, selling only to consumers or users and in accordance with the sales, advertising, and service policies of Moffats, as established from time to time.
2. To maintain an adequate display of these products in good condition.
3. To advertise these products, to use advantageously Moffats display material and sales literature, and to secure written authorization before undertaking any advertising or sales promotion activity on which we expect any reimbursement from Moffats and/or its distributor.

..."

(Exhibit H-2)

The later of the two forms of agreement and the one in use at the time the inquiry began, had the above sections worded as follows:

"In consideration of and on acceptance of this application by Moffats Ltd. (hereafter called Moffats) we agree:-

1. To actively promote the sale of Moffats products selling only to consumers or users and in accordance with the sales, advertising, and service policies of Moffats, as established from time to time, but nothing herein shall be construed as requiring or inducing us to sell at retail prices suggested by Moffats.
2. To maintain an adequate display of these products in good condition.
3. To advertise these products, to use advantageously Moffats display material and sales literature, and to secure written authorization before undertaking any advertising or sales promotion activity on which we expect any reimbursement from Moffats and/or its distributor.

. . ."

(Exhibit T-26)

The evidence does not make clear when the franchise agreement as in Exhibit T-26 was introduced. The form of agreement as in Exhibit H-2 was used in one case in January, 1953, although a franchise agreement as in Exhibit T-26 was issued to the same dealer on March 12, 1953.

3. Moffats Co-operative Advertising Plan

It will be noted that under the terms of the Moffat franchise agreement a dealer was required "to secure written authorization before undertaking any advertising or sales promotion activity" on which any reimbursement was expected from Moffats Limited. The principal activity of this class has been co-operative advertising in which, within certain limits, the dealer and Moffats Limited should share the costs equally.

The evidence does not show that Moffats Limited required dealers to secure written authorization in connection with co-operative advertising but it appears to have been the usual practice for a company salesman to discuss proposed co-operative advertising with a dealer and to indicate whether Moffats Limited would contribute a portion of the cost of such advertising.

The conditions with respect to advertising by a retail dealer are set out more fully as follows, in a revised form of franchise agreement which had not been put into use at the time of the

hearings in the inquiry:

"ADVERTISING. Dealer agrees to co-operate with Moffats' advertising and sales promotion policies, using only advertising and sales promotion material which conform with Moffats' policies and to the provisions of this agreement, and agrees to discontinue any advertising of Moffats' products disapproved of by Moffats. Notwithstanding the generality of the foregoing, the Dealer agrees:

- (a) Not to misrepresent Moffats' products.
- (b) That, in any advertising by dealer in which the price is designated, the year of manufacture and model number or name also shall be designated.
- (c) To have available for sale a reasonable number of each model advertised for sale by Dealer.

Dealer assumes all liability for costs of advertising initiated by Dealer except as may be set forth in any co-operative advertising programme which may be undertaken from time to time by Moffats in its sole discretion, and Dealer agrees to secure written authorization and approval before undertaking any advertising or sales promotion activity on which Dealer expects any reimbursement from Moffats."

(Exhibit B)

The following presentation of the evidence of H. C. Darroch, Vice-President of Moffats Limited in regard to the co-operative advertising plan of the Company is made in the Statement of Evidence:

"Q. You have a co-operative advertising scheme, do you not?

A. Yes.

Q. Could you explain to the Commission just how it works?

A. I could try to. I should explain first that part of the dealer's function, besides having a stock and having the material to display, and pay his bills, is that he does advertising, and that advertising he should do entirely on his own. A certain amount of advertising, that is part of his function. In addition to that he may do co-operative advertising; the manufacturer may encourage him to do co-operative advertising, in

which the manufacturer pays half the cost of the advertising.

In this co-operative advertising, it is designed to promote and sell all the manufacturer's products. This used to be almost compulsory, but it isn't any longer. These manufacturers supplies the layout or the mat to the dealer for use in co-operative advertising; it points to the selling features and to the advantages to the customer in buying the manufacturer's product. It is an instructive, creative selling in advertising form. If the dealer runs that advertising according to the manufacturer's ideas and says what he wants said in it, the manufacturer would pay half the cost. The basis for paying half the cost is that the dealer said to the manufacturer, when I run this advertising it not only benefits me but it benefits the other dealers in this area, because they get the benefit out of this advertising I am running on your product.

The principle of co-operative advertising is that the manufacturer receives benefit from other sources than the dealer doing the advertising, if the advertising is according to the policy of the manufacturer. That is, if the advertising said what the manufacturer wanted it to say, he would pay half the cost of it; and by paying half the cost, in my opinion he has a perfect right to say what goes into it. After all, if he said something that was derogatory to the manufacturer and hurt him, such as "Don't buy Moffat ranges, they are no good", you would not expect us to pay half the cost. The only purpose is to create more business for the manufacturer through other dealers. That was the principle behind it.

Q. Is there any limit to the amount?

A. The mechanics of the thing was limited to a maximum of 1-1/2 per cent of the dealer's net purchases. It was part of our advertising policy, to limit it to 1-1/2 per cent of the dealer's net purchases in any year. In other words, we would not let it carry on from one year to the next, and a maximum was established because you can go only to a certain point. You can't afford to pay half of all the dealer's advertising; as part of his franchise he is supposed to do some advertising on his own, which he should do.

Q. Have you found that this 1-1/2 per cent is ample to cover the advertising wants of the majority of the dealers?

- A. It was never intended to. If a dealer does not advertise beyond that amount he is not functioning as a proper dealer.
- Q. And if he advertises beyond that, would you continue to assist him or would you cut him off?
- A. We should, and our policy was to cut him off and refuse it. That has not always been done. Our policy is to do that, but we may go over it if we agree to do so prior to the advertising being run. As I say, we have at times gone over it, but principally because a dealer was putting on some special kind of campaign that we wanted to assist him on. With the idea of getting more sales, we might agree before the advertising was run that we would exceed the 1-1/2 per cent, but that is not a general thing. It was done in some cases. In a few cases the dealer has exceeded his 1-1/2 per cent, and we have accepted his claim, although it was contrary to our policy. Generally speaking, the maximum limit is 1-1/2 per cent, and we reserve the right at all times to refuse any claims over and above 1-1/2 per cent.
- Q. Has 1-1/2 per cent been found to be adequate?
- A. For co-operative advertising, yes.
- Q. How long has this system been in effect?
- A. I would think it goes back to about 1947 or 1948 with the Moffat company; I say that just from memory.'

(Evidence, pp. 18-21)

13. In the case of a dealer appointed by a distributor the same situation applies, that is to say, the dealer would be reimbursed on a fifty-fifty basis by the distributor to the extent of 1-1/2 per cent of his total purchases.

14. Mr. Darroch continued to give evidence as follows:

- 'Q. Was co-operative advertising assistance withheld at any time for reasons other than that the dealer had gone over his 1-1/2 per cent?
- A. Yes, very definitely. If the advertising was not in line with our policy or what we are going to pay for, then we won't pay for it. We will not pay for

advertising that is derogatory to us.

Q. Would you tell us more specifically what your policy is for co-operative advertising purposes?

A. Well, first of all, that he must say something constructive about the product, that it is a good product and give reasons why the customer should buy it. He should correctly describe the product; that is, he should say specifically that it is a 1953 model and so on, and not a 54 model of so and so that he is advertising. And part of our policy was that the price at which he advertised and for which we paid must not be below a certain figure which we establish from time to time. In other words, we are not going to pay for advertising which is going to hurt our sales through other dealers; that is one of our very firm beliefs, that if a dealer is going to advertise at such a low price that it stops other dealers from buying from us, then it is not our policy to pay for that advertising, because he has hurt our business instead of helping it. It is entirely contrary to our concept of why we are paying half the cost of that ad, and we think we have [a] perfect right to say what will go in the ad, if we are paying for it. That would not restrict him from doing the advertising at any figure he likes himself, but we are not going to pay for it if he advertises at a price which will hurt our business with other dealers and cause us to lose business and lose dealers, which constantly occurs.'

(Evidence, pp. 23-24)

15. Mr. Darroch gave evidence to the effect that it was company policy, upon the introduction of a new model, to assist co-operatively with dealers' advertising costs only if they advertised at the full suggested list price. Once, however, a particular model became widely distributed or in full production, it was still company policy to share the dealer's advertising expenses if the dealer advertised at price less than the suggested list prices, provided such reduced prices were first recommended or approved by Moffats Limited. The dealers would be informed of these prices for advertising purposes from time to time as changes took place (Evidence, p. 26). Mr. Darroch continued his evidence as follows:

'Q. And if a dealer went below that price he would no longer receive co-operative advertising assistance?

A. Yes, we would no longer pay for the advertising. We distinctly say he can advertise, but we won't pay for half the ad.

Q. In case he does advertise below and he does not receive assistance on the co-operative advertising scheme, would the Company endeavour to have him refrain from that type of advertising?

A. No. But conditions vary a great deal. Generally, we encourage our dealers to be good business people; we encourage them to have attractive stores, and to be polite to customers and not rude to customers; we encourage them to have a good sales talk. We have people who train them to sell. And certainly, we encourage them to stay in business and to pay their bills. In talking to the dealer we recommend a price in a way that he will make a profit, but we discourage them from doing things which will be injurious to themselves and may hurt us with other dealers.

We have tried for years to advise our dealers how to operate so that they will grow and be good dealers, but we do not tell them that they positively cannot do this or that. We may advise them against doing certain things which are of an injurious nature.

Q. Would you cancel the franchise of any dealer who persistently advertised below the established list price?

A. No, we never have cancelled a franchise for that reason, and to my knowledge we have never threatened to cancel one for that reason.

Q. Have you ever held up supplies to any dealer for that reason?

A. I heard since we started looking into this that we held orders for a dealer for two or three days until he straightened out, or until we had an opportunity of discussing with him why he was doing certain things in his advertising. But to the best of my knowledge, we have never held up shipments to a dealer for that reason, other than this case that I speak of, and that was corrected as soon as we were able to talk to the dealer.*

Q. Would the salesmen be instructed to refrain from

* This dealer was subsequently identified as George's Appliances Ltd. (Evidence, p. 82).

calling on those dealers?

A. No.

Q. If they persisted in price cutting ads?

A. No, we never to my knowledge have done that. There may have been some cases where some of our people have expressed an opinion that we should do that, but as a company we never have done it. As an official policy, it has never been done, and to the best of my knowledge it never has occurred that we refrain from calling on a dealer for that reason.'"

(Evidence, pp. 26-28)

4. Endeavour of Moffats Limited to Keep Control of Advertising Prices

There can be no question that Moffats Limited endeavoured to keep control of advertising prices of its dealers although its efforts were not always successful. Evidence as to the policy of the Company was given by C. A. Winder, General Sales Manager from December, 1949 to December, 1953 and who was thus in charge of sales before and after the passage of the legislation forbidding resale price maintenance.

(a) Period Prior to Prohibition of Resale Price Maintenance

Mr. Winder gave the following evidence in regard to the policy and practice of Moffats Limited in the period preceding the amendment of the Combines Investigation Act with respect to resale price maintenance:

"A. There never were instructions from a policy level in our company that dealers had to sell our merchandise at the suggested retail prices. I know that I was perhaps personally guilty of writing memoranda which could be interpreted in that way; but it was simply a case of controlling the advertising of our products in the newspapers, because our business depended upon our dealer organization. They were our outlets, and if we had a state of chaos existing in our dealer organization it would reflect on the company's sales volume. Therefore, any memoranda or any instructions that went out from me were on the basis of the prices at which the dealers could advertise our merchandise.

BY MR. WENTZELL:

Q. You say even prior to 1951 it was not general company policy to issue instructions to the dealers to maintain list prices, is that correct?

A. Yes. For all the years that I have been associated with the dealers, I knew all the time that prices were never maintained in the individual stores. We could go around and check ten sales, and you would find an actually different sales price in each case.

Q. You took no objection at that time to the dealers doing that sort of thing?

A. As long as they did it within their store, and did not come out one night with one dealer advertising at \$299, and the next night another dealer advertising at \$289 and the next night at \$279 and so on and so on; that would cause a state of chaos within our dealer organization, and that is the thing that we took steps to prevent.

Q. What steps did you take to prevent that sort of thing?

A. Well, I suppose they varied from time to time. But, for argument sake we would suggest to the dealer that we would not pay co-op advertising if they advertised below a certain percentage of our suggested retail price.

Q. Would that be the only step you would take, or would there be any threat of cancellation of his supplies or franchise?

A. No sir."

(Evidence, pp. 278-280)

(b) Period After Prohibition of Resale Price Maintenance

The following evidence was given by Mr. Winder as to the policy of the Company after the enactment of the prohibition:

"Q. What was the Moffat policy so far as price-cutting was concerned prior to the time you ceased working for them, say, between 1951 and 1954?

A. What do you mean, what was their policy?

Q. So far as cutting prices in advertising was concerned? Did they object to that?

- A. I think it changed during that period from time to time. Their earnings depended to a large extent on the volume of business, that is dollar volume, business produced; and we pretty well left it up to the salesman in the territory, because the conditions which might prevail in one territory did not necessarily prevail in another. What might be necessary in the eyes of one salesman in his particular territory to reach a certain dollar volume, might not be the same situation in another territory; and the salesman pretty [well] operated and ran their own line of business in their own territory.
- Q. Are the salesmen instructed to watch the prices at which certain dealers in their particular area may sell your products? That is to say, are the salesmen instructed to watch the prices at which dealers sell Moffat merchandise in their territories?
- A. When you say actually sell to the customer -- we wouldn't care.
- Q. Yes. Are your salesmen instructed to watch those prices?
- A. No. We wouldn't care what price the dealer actually moved the merchandise at. If you as a customer come into my store, it would not matter to the Moffat company what price you purchased a particular unit from me at, as long as the advertising in the Toronto paper had been proper. The Toronto papers have an effect on the entire trade for many miles around. It is a case, as I said before, of preserving unity within the ranks of the dealer organization.
- Q. In your opinion, would cooperative advertising be a means of inducing the dealers to refrain from advertising at prices less than the suggested list price, or the price at which Moffat and the dealer agreed on?
- A. Would cooperative advertising --?
- Q. Would it [be a] mean[s] of inducing the dealer to refrain from this type of advertising, because they would not be paid under the cooperative advertising scheme?
- A. In many cases dealers decide what they will advertise our particular merchandise at. If, for argument sake, a dealer had to move a particular unit, and our suggested price on which we would pay cooperative advertising was, say, \$299, and the advertising was \$249, if he felt he would have to advertise it at \$229 to move it, he would do so.

- Q. But in your experience with the dealer set-up, would the dealer generally speaking go out on his own and advertise at his own price, or would he be inclined to take advantage of your advertising policy, and to stay within your price in his advertising?
- A. In the majority of cases the dealer organization would work to the suggested price on which co-operative advertising would be paid, first from a loyalty standpoint on the part of the organization -- because most of the dealers try to co-operate as a group -- secondly, because they would retrieve 50 per cent of the actual cost of the ad.
- Q. Did you have any widespread number of dealers going out on their own and advertising at prices less than your suggested price?
- A. I wouldn't say you could use the word 'widespread'.
- Q. Generally speaking, it would be sporadic by the odd dealer here and there?
- A. Yes.
- Q. And the majority would conform to your advertising policy in order to take advantage of your reimbursement?
- A. Yes, correct."

(Evidence, pp. 281-284)

Mr. Winder emphasized that during his tenure as General Manager, in 1952-1953, no threat, refusal to sell or to supply had occurred, to his knowledge:

"Q. . . .

During 1952 and 1953 while you were with the company, did Moffats advise their dealers that they had to maintain their prices in advertising, and if not their franchises would be terminated?

- A. No sir.
- Q. To your knowledge, during 1952 and 1953 did the company terminate any franchises because a dealer reduced prices?
- A. No sir.

Q. During the same period, did they terminate any franchises because the dealer advertised below the co-op price?

A. No sir.

Q. To your knowledge during that period did the company or any of its representatives threaten to terminate the franchise because a dealer advertised below the co-op price?

A. Not to my knowledge.

Q. To your knowledge during 1952 and 1953 were goods sold by dealers at less than the co-op advertised prices as set by the company?

A. All the time.

Q. How do you know that?

A. From my association with dealers continually and talking to them.

Q. And did you refuse to supply any dealer because he so sold your merchandise?

A. No.

Q. Did the company during that period terminate any franchise for a dealer offering an article for resale at reduced prices?

A. No sir.

Q. Did during those two years that you were with the company [did the company] threaten to terminate the franchise of a dealer for offering merchandise for resale at reduced prices?

A. Not to my knowledge.

Q. Did the company cut off supplies with respect to any dealer who offered merchandise for resale at reduced prices?

A. How do you mean, terminate a franchise?

Q. Or did they refuse to sell goods to the dealer?

A. No sir.

Q. Or slow down shipments to them?

A. Not to my knowledge.

Q. Did they threaten to slow down shipments?

A. Not to my knowledge."

(Evidence, pp. 304-306)

For a period prior to September, 1953, it appears that the matter of determining the level of prices which would be approved for advertising purposes by Moffats Limited was left to a considerable extent to the discretion of the divisional sales managers. Mr. Winder gave the following evidence in regard to the change in company policy:

"Q. Was the policy of co-op. advertising and prices approved by the Company as being less than the suggested list price adopted during your period of General Managership of the Sales Department?

A. Yes, sir; I guess that is when it came into being.

Q. Did you make the decision or did somebody else in the Company make it?

A. It would, I think, be made at an executive committee meeting, of which I was a member.

Q. Do you recall at what time that policy was adopted?

A. Well, to the best of my knowledge it was adopted about the time -- we had endeavoured, I think, all through to more or less control the advertised prices; and the actual basis was different in each territory, according to conditions in the territory. However, I think perhaps this memorandum of mine, of September 4, marked AMB-317 --

Q. What year is that?

A. September 4 last year, 1953. I think that was perhaps the first general move of that kind.

Q. Is it your recollection that up to this time you had engaged in co-operative advertising only if the dealer used the actual list price?

A. No sir. We, as I say, had a price at which we would co-operate on advertising, but we would vary perhaps from territory, depending on competition. In other words, it was done more at the sales representative and divisional

level than at management level.

Q. What are you suggesting was the change at this time?

A. Well, this memorandum here says that if dealers take a trade-in of more than 20 per cent of suggested price -- that was the general policy, and it went out to the three Division Managers, in British Columbia, Ontario and Quebec. That was just a move on the Company's part in the interest of the dealers generally, so that it would not reach a state where the price would go down, and down, and down.

Q. Are you suggesting that prior to this time the actual level of prices at which co-operative advertising would apply was determined individually by each of your District Managers?

A. More or less, yes.

Q. And that since this date in September, 1953, the matter has been one of general Company policy, at least during the period you were there?

A. It was at that point that I took the step to put more or less of a floor on it. I did say that it didn't go beyond that point in many territories previously, but at that particular time it was a matter of a lot of chaos within the dealer organization generally, and the dealers were 'phoning and being very annoyed at us for permitting the type of advertisements that were appearing; and to show that we did not approve, we had to set up something that would be the limit to which we would go as far as co-operative advertising was concerned."

(Evidence, pp. 306-308)

The evidence of C. R. Smyth, General Sales Manager since January, 1954, and previously Ontario Sales Manager from August, 1950, was no less emphatic than that of his predecessor on the Company's behaviour with respect to resale price maintenance:

"Q. What is the company policy with respect to resale price maintenance?

A. As far as retail price maintenance is concerned, I think that the public today have probably been able to purchase merchandise of all description not only in the lines we handle but in other lines at a lot lower price than they were

ever able to buy at previously. We have constantly endeavoured to close the gap between our suggested retail list price and the dealer's cost. We always felt that the dealer was making too big a markup, and thus inflated the end price which the customer had to pay. As a result of the Act that price has narrowed down considerably from what it was previously.

Q. But does your company do anything to maintain the price that the dealer sells at?

A. Absolutely not. We have to the best of my knowledge never tried to control prices at which the dealer sold merchandise in his store.

Q. To your knowledge has the company terminated any dealer's franchise for reducing prices?

A. No.

Q. To your knowledge, has the company terminated any dealer franchise for his offering for resale at reduced prices?

A. No.

Q. To your knowledge has the company threatened to terminate any dealer franchise for reduced prices?

A. No.

Q. To your knowledge, has the company threatened to terminate any dealer franchise for offering for resale at reduced prices?

A. Not to my knowledge.

Q. And have dealers run ads in newspapers specifying prices lower than the co-op advertised price?

A. Yes.

Q. And has the company or any of its representatives, to your knowledge, done anything about those ads with the exception of refusing to pay co-op?

A. No.

BY MR. WENTZELL:

Q. Mr. Smyth, I have another question or two. What has been the discount structure of the company in the past four or five years? Has it been a uniform discount, as far as the dealers are concerned?

A. Yes.

Q. You just said that the company has been endeavouring to close the gap between the suggested list price and the dealer's cost price?

A. Correct.

Q. But they have not endeavoured to do that by way of maintaining the rate of discount which existed prior to retail price maintenance legislation?

A. If we were to offer 25 per cent discount off our products, which we would like to do, we would not be in this business very long, because our competition would run us right out of business. We would not get the dealer support.

Q. So the closing of the gap between the suggested list price and the dealer's list price has been a matter of competition?

A. That is correct."

(Evidence, pp. 225-227)

CHAPTER III

OPERATION OF MOFFATS CO-OPERATIVE ADVERTISING PLAN

While the general outline of the co-operative advertising plan of Moffats Limited has been given in the review of the evidence in earlier sections of this report it is necessary to examine the evidence relating to the actual conduct of the affairs of the Company in connection with dealer advertising before considering the effects of the Company's actions.

The promotion of the sale by dealers of models of appliances being replaced by new models or carried over from a previous season appears to have been a matter which has received close attention by Moffats Limited.

The minutes of an Ontario Sales Meeting of employees of Moffats Limited held on January 26, 1953, and circulated among company officials by C. R. Smyth, then Ontario Sales Manager, on January 30, contain the following:

"Advertising

The salesmen were advised that the Company would condone advertising by dealers of our 1952 models at special prices providing that the ad definitely specified that they were 1952 models, and secondly, that the price reduction was not more than 25% off our present suggested retail list."

(Exhibit A-AMB 322)

Minutes of a similar meeting held on March 30, 1953, and circulated by C. R. Smyth, on March 31 in the same manner make the following reference to the same subject:

"Cut Price Advertising

It was decided after considerable discussion that we should cut out the price cutting advertising which we have allowed to go on for clearing of the 1952 models of electric ranges and refrigerators, and it was decided to discontinue this type of advertising effective the 15th of April. It was discovered that both New Era and Better Plumbing still have approximately 100 1952 refrigerators left, and for this reason, the date was extended to April 15th instead of April 6th to give these two accounts a chance to unload this merchandise. It was felt that so long as we have an inventory of 1952 gas ranges, and as long as the gas range market remains quiet we

should continue to allow the dealers to promote gas ranges in the manner which has been already approved."

(Exhibit A-AMB 23c)

The implementation of this decision was directed by C. R. Smyth on May 5, 1953, in the following memorandum to J. O. Wilson, then the Company's representative in the Hamilton district:

"It would appear that in your territory you are still allowing cut price advertising not only on 1952 merchandise but on 1953 merchandise. Therefore, effective immediately this type of promotion must cease, and if we allow one representative to carry on this type of merchandising in order to increase his volume, then it is only fair that we should allow the rest of our representatives and divisions to do so also."

(Exhibit A-AMB 318)

In a report to C. R. Smyth covering the week ending June 26, 1953, J. O. Wilson wrote:

"Had to see Ont Furn re ad which appeared last week on merchandise with cut prices (will see you re results)."

(Exhibit A-AMB 281r)

The application of company policy with respect to advertising was discussed in the summer of 1953 in correspondence between C. R. Smyth, Ontario Sales Manager and A. B. Harcourt, Manager of the Company's office in Montreal. On June 26, 1953, C. R. Smyth wrote to A. B. Harcourt:

"I am writing to you to find out what success you are having with your programme in allowing your dealers to run ads on our merchandise at reductions up to 25%. We have been holding the line as steadily here in the City as possible, and have forbidden our dealers to promote in this manner. However, I do feel that the Company is losing business because of this, and I am wondering if since you have changed your policy and allowed them to promote in this manner if it has improved your volume in any way."

(Exhibit A-AMB 304)

In a reply dated June 30, 1953, A. B. Harcourt wrote:

"In reply to your memo of June 26th regarding our program in allowing our dealers to run ads on merchandise at

reductions up to 25%, as explained yesterday, we have for some considerable time now taken the stand that such practices will not be tolerated.

I do agree with you that as a result of this policy, our company is loosing [sic] business.

In going through some Toronto papers yesterday, I noticed several advertisements [sic] of Moffat and Crosley appliances being advertised at a reduced price but I am assuming that this advertising was done without your blessing and the complete cost being assumed by the dealer.

Should you decide to change your policy with respect to this form of advertising, I would appreciate very much being informed as it seems that the only way to obtain any volume is to follow the practice which all year have [sic] been existing with several leading manufacturers."

(Exhibit A-AMB 303)

On July 31, 1953, C. R. Smyth sent a memorandum marked "Confidential" to his district salesmen which read as follows:

"We have decided to temporarily ease up on our advertising policy with regard to the type of ads which may be featured in the newspapers.

At the C.N.E. we will show a new line of ranges, and we do not want, under any condition, to have this new line of ranges advertised at other than our suggested retail list price. However, we will allow ads on our present line.

On any ads which the dealers run which are not a national type ad or ads which are price cutting ads we will not pay co-operative advertising. We do not want to go out whole heartedly and solicit the support of the dealers in running price cutting ads but we have decided after a meeting of the Sales Committee that we are losing volume in the big centres by sticking to our present advertising policies. Therefore for the month of August at least we will allow ads other than national type ads to be run by dealers, but we will not pay co-operative advertising on these ads."

(Exhibit A-AMB 330)

A decision which apparently modified this policy is indicated in the following memorandum of August 26, 1953, from H. C. Darroch to D. R. Moffat with copies to C. A. Winder, F. I. Yewman

and C. R. Smyth:

"As a result of the recent outbreak of price cutting in the newspapers, we have adopted a policy in advertising of any price concessions taking the form of trade-ins, limited to 20% of the suggested retail price of the article."

(Exhibit A-AMB 38)

Apparently in response to Mr. Darroch's memorandum, C. A. Winder sent the following instructions on September 4, 1953, to the advertising manager and divisional sales managers of the company:

"As a result of the recent outbreak of price cutting in the newspapers, H.C.D. has advised that if dealers take a trade-in of more than 20% of the suggested retail price of the appliance, we should not pay co-operative advertising.

Will you please see that all dealers and distributors are advised of this by letter."

(Exhibit A-AMB 317)

Mr. Darroch said in evidence that this direction was not according to his instructions as he had referred to dealers advertising trade-in allowances of more than 20% (Evidence, p. 53).

Later in September, 1953, J. O. Wilson arranged a meeting of some of the Moffat dealers in Hamilton. On September 17, Wilson made the following report of the meeting to C. R. Smyth:

"On Thursday evening Sept 17 as arranged I had a meeting in Hamilton with the following listed promotional minded dealers in attendance, - Ontario Furn. - Dominion Furn. - Home Out-fitting - Ideal Furn. - Wunder Furn. - Ottawa Furn. - & King Appl.

My motive for the meeting was the hope that by getting these dealers to-gether, there could be established, a degree of co-operation and understanding thereby stopping the 'cut-throating' 'hard feelings' and above all price cutting.

I sincerely believe that the meeting was most successful -

It was established, and agreed upon, (1) that the top discount to be advertised was to be no more than 15% off 'list price' in the form of a trade in allowance and that, 'list price' was to [be] listed in all 'ads' - (2) that there would be no store window displays or window banners unless they complied with

the above - (3) there would be no 'gimmicks' or 'give aways' used in conjunction with Moffat appliances - (re - free hook-ups etc) (4) on manufacturers' distress merchandise (re 19/52 gas ranges with 19/54 gas ranges available) I, as representative [sic] for the company would establish discount structure & promotion."

(Exhibit A-AMB 319)

In his evidence J. O. Wilson said that some time later he may have adopted the further policy of approving the advertising of a price with trade-in allowance without making any formal record of such a change. He gave further evidence:

"Q. That was your policy as far as you were concerned on behalf of the company up until the time you left them?

A. Up until the time I came in, yes. When I came to Toronto, I had adopted these plans in Hamilton; there were some rough spots in them. I think that was one of them. I introduced it into Toronto. Unfortunately a couple more ideas were not permitted to be used on the basis that we were introducing new merchandise at that time, and they did not want the list price decreased. So we had to hold back on them until a later date.

I think there is a letter or a memorandum there to the effect that what I was doing was presented to management and they were to approve. As I say, because of objections that they did not have that merchandise available in sufficient quantities it was declined at that time. However, I do believe we went further than that, as far as cut-prices were concerned. It is unfortunate, but it is a fact."

(Evidence, pp. 352-353)

No modification of the arrangement made on September 17 is indicated in the following letter of J. O. Wilson to dealers in Hamilton on September 30, 1953:

"I hereby authorize the selling price of 1144s for \$299.00 and the reason for this being that we are trying to clear our present stock as our new models of 3144s are in production. However, in order to co-operate with dealers who are trying to complete transactions at the present list price, no ads shall appear at this new suggested price before Thursday, October 8th.

I hereby authorize as the leader model in refrigeration, the CAE-8 to be sold at \$299.00. The 15% deal still stands on

all other models as arranged two weeks ago and the 15% deal applies to all ranges and refrigerators other than the CAE-8 and the 1144. All ads must have the trade-in allowance and suggested list price laid down by Moffats to protect dealers who cannot see their way clear to purchase in quantity in order to obtain special discounts."

(Exhibit A-AMB 96)

Plans to increase the sale of certain models of refrigerators, including model CAE-8 referred to in the letter of J. O. Wilson quoted above, were outlined by C. R. Smyth in a report to C. A. Winder on October 6, 1953. Plan A, which was the one adopted, included the following features:

"Plan A would maintain our present retail list prices and offer an additional discount to the dealer. Dealers would be allowed to advertise these boxes at a special clear cut price. . . . If Plan A were used it would be our policy to first of all have the Departmental Stores feature a large ad in the evening papers as we believe their power of advertising would benefit our whole dealer organization. We would then quickly follow these ads by having such people as New Era and Better Plumbing run ads right after the Departmental Stores. We cannot see any adverse reaction to this type of promotion inasmuch as the small B and C Class dealer will be able to meet the prices offered by the larger stores, and we believe that Plan A could be worked very successfully."

(Exhibit A-AMB 7)

In response to an inquiry from A. B. Harcourt, Divisional Manager in Montreal, C. R. Smyth gave the following description of the manner in which Plan A would be carried out in replying on October 14, 1953:

"With regard to our refrigerator plan it is our intention to have a half page ad run by the T. Eaton Co. Ltd., on Friday. This will be the first of the ads to appear, and our reason for having Eatons run the ad ahead of anyone else is because of their terrific power of advertising in the Ontario area. On the day the ad is to appear it is our intention to contact all dealers in the Toronto area, particularly those who could purchase refrigerators from us under Plan A, and be in a position to meet Eaton's price. We will then immediately follow up early next week with our heavy advertisers such as New Era and Better Plumbing and continue this effort throughout, endeavouring to cover the newspapers completely in Ontario during the next ten day period. We will have contacted all dealers by that time, and offered

them the deal so that they will be able to meet the prices advertised.

I will advise you further after the Eaton ad has run what results have been obtained. It is our thinking that by this procedure, if the public is susceptible to buying refrigerators at all, that we should be successful in moving a large quantity quickly."

(Exhibit A-AMB 308a)

Mr. Harcourt made the following further inquiry on the same day:

"RE REFRIGERATOR PLAN A DO YOU PROPOSE TO HAVE ADV APPEAR SHOWING RETAIL PRICE LESS TRADE IN OR STRAIGHT \$289.75 AS IN INSTANCE OF CAE 8."

(Exhibit A-AMB 305)

Mr. Smyth replied as follows:

"IT IS OUR INTENTION TO DISREGARD THE TRADE IN ALLOW- ANCE ON REFRIGERATOR PLAN A. HOWEVER, I THINK IT ADVISABLE TO SHOW AS IN THE CASE OF THE CAE 8, THE RETAIL LIST OF \$379.75, SPECIAL \$289.75.

I AM HAVING A MEETING TONIGHT WITH OUR MEN AND WILL ADVISE YOU IF ANY FURTHER CHANGES FROM THIS POLICY."

(Exhibit A-AMB 310)

The promotion of the sale of refrigerators along the lines outlined by C. R. Smyth was apparently undertaken by A. B. Harcourt in Montreal as on November 5, 1953, Mr. Harcourt sent the following message to Mr. Smyth:

"EATONS ADD. ON REFRIGERATORS APPEARED NOV 3 ONLY THREE SOLD. NOW PLANNING A FULL PAGE ADV. WITH COOPERATION OF FOUR DEALERS. HAVE YOU ANY OBJEC- TION TO DEALERS FURTHER REDUCING NEW RETAIL PRICES - I.E. AT THEIR DISCRETION WITH OUR APPROVAL IN QUEBEC - STILL COOPERATING ON OUR ADVERTISING."

(Exhibit A-AMB 313a)

In a reply on the following day, Mr. Smyth said:

"RE MM-11 NOVEMBER 5 HAVE NO OBJECTIONS TO DEALERS FURTHER REDUCING RETAIL PRICES PROVIDING YOU APPROVE PERSONALLY AND THAT ON A CASE LIKE EATON'S OR WOODHOUSE IT IS MADE CLEAR TO THEM THAT THESE PRICES ARE NOT AUTHORIZED AS FAR AS ONTARIO IS CONCERNED. IT IS IMPERATIVE THAT YOU CONTACT EVERY ACCOUNT THAT MIGHT ADVERTISE AT YOUR PRICES IN ONTARIO AND ADVISE THAT THIS APPLIES TO THE PROVINCE OF QUEBEC ONLY. WILL CO-OPERATE ON ADVERTISING TO THE EXTENT OF 1-1/2% MAXIMUM OF THE INDIVIDUAL DEALER'S PURCHASES AS OF NOW. ANYTHING BEYOND THIS FIGURE MUST BE PAID BY THE DEALER AND CANNOT BE HELD AS A DEBIT BALANCE UNTIL THE ACCUMULATION REACHES THAT POINT."

(Exhibit A-AMB 312)

In January, 1954, C. R. Smyth became General Sales Manager of Moffats Limited and he was succeeded as Ontario Sales Manager by J. O. Wilson. On February 22, 1954, an Ontario Sales Meeting was held and the minutes of this meeting which were circulated by J. O. Wilson, included the following:

"Advertising Policy

We have adopted a flexible advertising policy which from time to time will be altered at the discretion of this office. No co-operation will be paid on any ad that appears without the supported price laid down on our product. All salesmen were familiarized with the present co-operative basis on which advertising will be accepted."

(Exhibit A-AMB 324a)

On February 24, 1954, J. O. Wilson held a meeting at the Royal York Hotel in Toronto with three other Moffat representatives and what he described as "the more aggressive and promotion minded dealers of the City of Toronto". At this meeting Mr. Wilson put forward a plan which would give the same opportunity to all dealers to make purchases from the Company and provide for co-operation in advertising. The outline of the plan, which was apparently announced in the form of a prepared address at the meeting, was forwarded by J. O. Wilson to H. C. Darroch and C. R. Smyth with a covering memorandum on March 12, 1954. In the latter, Mr. Wilson wrote:

"In order to have given the enclosed plan an opportunity to function for at least two weeks, I purposely held up forwarding same to your office so that I might allow myself a more

comprehensive study of said plan.

On Wednesday, February 24th, I called for a meeting of the more aggressive and promotion minded dealers of the City of Toronto. This took place at the Royal York Hotel, and in attendance were Lawson Appliances, New Era Appliances, Georges, E. J. Hunter, Michaels, Eddie Blacks, Binningtons, Better Plumbing and Alexanders, and from our organization Ed. DeGuerre, Chuck Marchant, Bob Barry (the third Toronto representative) and myself.

The purpose of this meeting was to try to establish an advertising policy which would offer some semblance of co-operation between the manufacturer and the dealer. It was becoming increasingly more obvious that our products were headed for a cut throat price war.

So far this plan has been accepted by our dealer organization, and I am happy to relate is beginning to function to perfection. This is by no means a guarantee that it will continue along this course. However, it has a better than even chance because it does offer an answer to most of the dealers' problems. As was said after the meeting, 'It might not be the perfect answer, but at least it's a step in the right direction so why not co-operate?' That seems to be the overall reaction in one sentence, and I cannot help but feel that the dealers like ourselves are only too happy to try anything that might rectify the price cutting situation.

This plan does not eliminate cut prices. In fact on the surface appears to encourage same. However, cut prices and price wars are distinctly different to each other. As a price cut is a price agreed to and maintained (off the suggested list price), a price war leads to the breaking of the back of a small or poorly financed dealer. This plan eliminates price wars.

. . . "

(Exhibit A-AMB 17)

The enclosed plan contained the following:

". . . The customer won't come into the retail store unless the price is right. Overhead costs are the highest in the appliance industry's history. Bigger, more expensive ads, are necessary in order to attract attention. GIMMICKS HAVE PROVEN TO BE USELESS. So you give the customer what he wants. LOWER PRICES. The IRONY of this fact is that when you sacrifice your profit in order to sell the manufacturer's product, the manufacturer won't co-operate on the ad because

you are below the suggested list price."

The proposals made by J. O. Wilson in this plan were as follows:

- "1. Offer all dealers the same opportunity at the same time to purchase merchandise at the same price (reference to special prices, quantity prices, etc.)
2. For the dealers that make those purchases to allow them to decide on what price they wish to advertise at, and then for us to co-operate on the ad.
3. Each of the other dealers will then be notified of said purchases and of the selling price to be advertised. These dealers will then be expected to respect that price by not promoting against it.
4. If the dealer does advertise against such a promotion, we will not co-operate on the ad, and he is immediately left off our call list for specials or deal prices."

(Exhibit A-AMB 48a[18])

Mr. Wilson gave the following evidence in regard to the adoption of this plan which as indicated, was intended to apply to special or clear-out merchandise:

"Q. Was this plan actually put into effect by you?

A. Yes, it was.

Q. Did the dealers in the city of Toronto cooperate with you?

A. To the nth degree.

Q. There were no variations whatsoever?

A. None whatever.

Q. And it wasn't necessary to fail to cooperate on your advertisements with any of these dealers, as outlined in paragraph 4?

A. No, it certainly was not. That is right.

Q. And none were left off the call list for special deal prices?

A. No.

Q. And that was right up to the time you left the Moffat organization?

A. That is correct."

(Evidence, pp. 324-325)

The following evidence was given by J. O. Wilson as to the manner in which he presented the plan to the dealers at the meeting:

"Q. At this particular meeting that we referred to in February, 1954, Mr. Wilson, did you at that time threaten any of those dealers who were present, that if they did not abide by this minimum price that was agreed upon, their franchise would be cancelled?

A. When you say 'threatened', I threatened by stating as I did in paragraph 4, that I wouldn't call on them and wouldn't cooperate in their advertising.

Q. Did you intimate you would cancel their franchise if they did so?

A. No.

Q. Did you intimate to them that you would not sell them any goods, period?

A. When you say, 'intimate' you mean come out and say so?

Q. Come right out and say it.

A. No, I am not crazy enough to do that.

Q. Did you suggest to them that their orders would not be filled?

A. No, I wouldn't say that.

Q. Or that they would receive something other than what they ordered. You did not say that at that particular meeting?

A. I might have raised the inference probably, not intending to do it; but the fact that I might have some better effect from the proposition; I would say that, but I certainly did not do it and I never followed through either, and I would not have anybody say as a witness that I did.

But at the same time, in selling you have got to impress a person when telling them a fact, that it is a true

fact and that you mean what you say; that you are not just talking wind and trying to make yourself heard and so on. With that impression I don't want to mislead in any way now. I might have impressed them, or led them to believe, that there might have been other action taken; that I was going to stand behind this and make it work, if they decided they wanted it. That is why I left it up to them in the end; I wouldn't force it on them. I asked them if they wanted it, and we got up and shook hands and thought it was terrific, because it was the first time anybody had come to them and offered them something that could be worked, and would cause the dealers to realize they couldn't go against each other constantly and sell merchandise and make a legitimate profit.

Q. This system did work out reasonably well, in your experience?

A. Definitely."

(Evidence, pp. 334-336)

Other representatives of the Company, namely, H. C. Darroch, C. R. Smyth and E. R. B. DeGuerre stated in evidence that the plan proposed by J. O. Wilson was not adopted as the policy of the Company. Mr. Darroch said:

"That was Wilson's plan; it was his own personal thinking, and not the company policy, and it was not adopted."

Mr. Darroch then said:

"A. . . . He tried to make the thing function but it just didn't, and that is all.

Q. If it had functioned, would it not have been adopted by the company?

A. I don't think so. We might try at times to influence the dealers to keep their prices on a cooperative advertising basis, but we never penalized them if they didn't do it."

(Evidence, pp. 65-66)

On March 3, 1954, C. R. Smyth wrote to J. O. Wilson in regard to discussions with representatives of the T. Eaton Company who were reported by Mr. Smyth as being "very bitter at the prices which are being offered in Toronto" on Moffat merchandise. Mr. Smyth went on:

"Just as quickly as possible you will have to bring the dealers in line, keeping in mind the mark-up which the T. Eaton Company will require to merchandise Moffat ranges on their floors."

(Exhibit A-AMB 42)

Although, as already indicated, C. R. Smyth gave evidence that the plan proposed by J. O. Wilson at the meeting of February 24, 1954, was not put into effect by the Company, he appears to have brought the plan to the attention of divisional managers and to have informed them that it appeared that the plan, on the surface at least, was working. Mr. Smyth's memorandum, dated March 24, 1954, was addressed to the three divisional managers with a copy to J. O. Wilson and read as follows:

"I am attaching a copy of a memo received from Jim Wilson with regard to price cutting in the City of Toronto. As you know, it has been fairly severe here in the City, and we have been concerned about it.

However, J.O.W. has come up with a plan which appears, on the surface at least, to be working and I think you will perhaps want to give consideration to it in your own areas.

Discount houses are, I believe, a problem which we will have to contend with for many months to come, and while I do not like this type of an operator, nevertheless it has been proven to us in Toronto that where a situation of this type exists we as a manufacturer are very foolish indeed to think that we can sit back and keep our name clean.

It is true that we could do this; however, our volume of business would suffer accordingly, and I think where we are running into competition from discount houses, then the only thing we can do is to go along with them.

However, this plan which J.O.W. has suggested is planned to stimulate advertising and at least establish some kind of prices on our products, and I suggest that perhaps you would like to consider this matter and work it into your territory in the best possible way which meets your particular conditions."

(Exhibit A-AMB 44)

On March 25, 1954, H. C. Darroch wrote the following memorandum to D. R. Moffat with a copy to C. R. Smyth:

"Advertised Prices of 1954 models

The dealers in Toronto have agreed with us on the prices at which they will advertise our current model ranges and to date, no dealer has advertised lower than these prices. This situation is being very closely watched.

... "

(Exhibit A-AMB 37)

Mr. Darroch gave the following evidence in regard to this memorandum:

"Q. Who would advise you of this situation in Toronto?

A. Through our sales department and our general sales manager.

Q. There would have been a meeting between the Moffat dealers in Toronto and --

A. No not at all; it is just a discussion between myself and the sales department at Moffats, or certain individuals at Moffats, and there was no meeting with the dealers.

Q. Would the dealers have been contacted by telephone?

A. No. I think what this refers to is when we introduced a new model, as we did in March, we asked the dealers not to advertise them at other than our suggested retail price until we got the stock in the hands of all dealers and got them functioning, because if they don't do that the other dealers won't buy. However, as I recollect it now, while we asked them not to do it, they did advertise them at cut prices, although we hoped they would not. We never threatened them at any time as to what we would do about it if they did not follow our suggestion. In other words, we considered it good business for them not to immediately cut prices on new models, to give us an opportunity to sell them to other dealers and get them into stock."

(Evidence, pp. 72-73)

The advertising of 1954 models was also the subject of the following memorandum of April 14, 1954, from C. R. Smyth to J. O. Wilson with a copy to E. DeGuerre:

"Under no circumstances, without a prior meeting with yourself, E. DeGuerre and myself, will you authorize or allow

cut-price advertising on our 1954 line."

(Exhibit A-AMB 46)

On April 21, 1954, a meeting of certain Moffat dealers from Toronto and other centres was held in the Company's offices under the chairmanship of J. O. Wilson. The meeting was described as "Product Development and Improvement Meeting" and a considerable part of the discussion appears to have been directed to the features of various models. However, attention was also given to co-operative advertising. Minutes of the meeting prepared by E. R. B. DeGuerre under date of April 23, 1954, and sent to J. O. Wilson, H. C. Darroch, C. R. Smyth and T. R. Wright contain the following in connection with this subject:

"... Promoting dealers all want their ads to pay off and are going to advertise brand merchandise at the best possible price on a co-operative basis if possible. If co-op were cut off, naturally other products will be promoted where co-op can be extended. Certainly it would be pure folly to dampen the enthusiasm of any promoting dealer because he was above his 1-1/2% allowance for any period. We lose the advertising selling potential of price maintenance [sic] control or both. (This is a solution not part of minutes.)"

(Exhibit A-AMB 336c)

The minutes then deal with a recommendation in regard to advertising prices of 1954 models which is prefaced by mention that co-operative advertising on 1953 models would cease on April 24. The minutes then go on:

"... In order to stimulate sales, to have dealers actively promote our products, it was suggested that more realistic prices should be established and that our list prices today mean nothing except for setting our discount classifications. Therefore, an advertising price that is competitive with other makes and offers good value and will sell our product must be established. Advertised prices equivalent to approximately 20% off our suggested list seemed to be well accepted by all dealers and it was felt that promotions at this time of year, our main selling season, advertised prices should bring tremendous results."

The minutes then set out suggested advertising prices on electric ranges and refrigerators which, it is stated, the dealers felt should be raised about \$10.00 in each case so that trade-in allowances could be offered in the ad. The recommendation is then made that the prices as revised "should be approved by our management as quickly as possible as most of our dealers have ads prepared right now, ready to

roll and waiting for these prices." (Exhibit A-AMB 337d).

Further reference to the prices in co-operative advertising of 1953 models is contained in a memorandum of April 26, 1954, from E. R. B. DeGuerre to J. O. Wilson and certain salesmen:

"For purposes of approving co-operative ads, the following prices were the ones we agreed upon for dealers advertising clearance of 1953 products. The advertising dates agreed upon were from April 10th - 24th inclusive."

(Exhibit A-AMB 338)

The memorandum then lists prices for certain models of washing machines, ranges and refrigerators, including the following:

Crosley	CAE	8	249.00
"	CAE	9	279.00
"	CMAE	95	289.00

The recommendation to approve prices for co-operative advertising of current models at less than suggested list prices was apparently not adopted at this time. On April 27, 1954, C. R. Smyth wrote to H. C. Darroch as follows:

"There is a great deal of pressure being brought to bear by several of our operators in the City of Toronto to allow them to advertise 1954 merchandise at prices below our suggested retail lists.

Our Ontario Division, namely the representatives in the City of Toronto and J. O. Wilson, have discussed this programme with them in great detail. Generally speaking, they wish to advertise at prices approximately 20% off our suggested retail list prices. Our Ontario Division, on the other hand, prefer to compromise between 15% and 18%."

The memorandum then referred to discussions Mr. Smyth had had with the representative of a department store whose attitude was reported to be that the Moffat line would be dropped if the Company co-operated with dealers on cut-price advertising. His memorandum went on:

"I would prefer to delay the authorization of this advertising and review this situation again at the end of May. I believe J.O.W. should inform these dealers that a new franchise agreement is forthcoming within the next three to four weeks and that there will be a mass cancellation of all dealers in the City of Toronto and only those dealers who co-operate with us will be

re-franchised. This threat, I believe, may be sufficient to hold back any advertising on our 1954 line.

I have asked J.O.W. to discuss this with you first thing Wednesday morning, as it is necessary for us to give some reply to the Toronto dealers by the end of this week."

(Exhibit A-AMB 49)

Mr. Darroch said in evidence that while the Company was thinking of a general cancellation of franchises in connection with the introduction of a new franchise agreement no action had been taken in this direction and to the best of his knowledge the dealers were never advised of the fact that their franchises would be cancelled (Evidence, pp. 76-78).

The effect of the co-operative advertising price on promotion of the Company's products was referred to in a memorandum of April 30, 1954 to C. R. Smyth from F. I. Yewman, Assistant to the General Sales Manager in which he said:

". . .

We are not getting to first base with our Bendix Economat promotion because the dealers will not advertise it at \$249.00 unless they can put in 'trade allowance'. This is extremely serious, and I wish you would give it some thought and let us go ahead on this basis if you approve it. It is not the solution to our problem, but I think we will get partial relief in a hurry if we do this."

Mr. Yewman then went on to discuss the question of advertising 1954 models as follows:

"I am afraid that somebody is going to blow the lid off on '54 merchandise if we do not step in and have another meeting with the local dealers and give them the prices that we will pay co-op on. This not wishfull [sic] thinking, because the indications are in the air. I am going to try and nail Herb tomorrow and see if I can get some sort of a decision from him, and will advise you as soon as possible."

(Exhibit C-AKE 7)

In May, 1954, an advertisement of a dealer in London, Ont, in which 1954 models were featured at less than the suggested retail list prices, was brought to the attention of C. R. Smyth by another London dealer. The matter was apparently referred to J. O. Wilson, who reported to C. R. Smyth on May 25, 1954, that he had contacted

three dealers in London, including the dealer who had published the advertisement. Mr. Wilson's memorandum concluded:

" . . . The results - all parties promised faithfully to co-operate and not run any more price cut ads on '54 merchandise."

(Exhibit A-AMB 25)

On June 4, 1954, a telegram was sent from the Company's head office in Weston to its representatives in four localities in Ontario, including Hamilton, Ottawa and North Bay with the following message:

"PLEASE NOTE MONDAY JUNE SEVENTH TORONTO DEALERS WILL ADVERTISE TABLE TOP RANGES WITH TRADE ALLOWANCE"

(Exhibit A-AMB 239)

This was followed by a list of prices for seven specified model numbers.

Reference was made above to the co-operative advertising plan in connection with Economat washing machines under which the price for advertising had been set at \$249. A memorandum of June 7, 1954, from C. R. Smyth to divisional managers indicates that a lower price was subsequently established. In this memorandum Mr. Smyth wrote with reference to a meeting held on June 3:

" . . .

It was decided not to allow the dealers to advertise below \$229 particularly in the Toronto and Montreal markets.

In Winnipeg and Vancouver, because of their distances from this market, the price at which the Economat model will be advertised, will be left to the discretion of the Divisional Manager. However, the quantity price for 50 units must not be exceeded."

(Exhibit A-AMB 48)

CHAPTER IV

ACTIONS OF MOFFATS LIMITED WITH RESPECT TO CERTAIN DEALERS

In the Director's statement evidence relating to incidents in connection with three Moffat dealers, two in Toronto and one in Hamilton, is presented as indicating refusal on the part of Moffats Limited to share in the cost of advertising its products by the dealer or the refusal on the part of Moffats to supply goods.

A. Lawson Appliances, Toronto, Ont.

Lawson Appliances deals in products of Moffats Limited in connection with its business as a retailer of appliances at 1640 Avenue Road, Toronto, Ont. On February 25, 1953, Lawson Appliances published an advertisement in the Toronto Daily Star. A portion of this advertisement featured the sale of a Standard model, Crosley refrigerator at \$339.00 and a DeLuxe model at \$379.00 "less trade", the regular price of which was shown at \$479.95. This portion of the advertisement also included the following: "Save 100.95 plus 30.00 trade". Lawson Appliances sought reimbursement for a portion of the cost of the advertisement under the co-operative advertising plan of Moffats Limited and was refused. Lawson Appliances then made an appeal to the General Sales Manager of Moffats Limited in a letter of July 17, 1953, which contained the following:

" . . .

As you are no doubt aware, we have tried in the past to co-operate to the fullest extent with your Company's policies since any conflict is extraordinarily expensive. You will recall at least one occasion when Mrs. Chambers was forced to telephone you at a very late hour to confirm a price for newspaper advertising. In view of this we find our present situation somewhat embarrassing.

The advertisement in question contains a photograph and prices on a reduced D C 9 refrigerator. We had formerly advertised this box at \$379.00, sale price. When preparing the script for our final advertisement, we consulted Mr. Craft, our sales representative, to ask him for approval on the addition of the two words 'Less Trade', in addition to the quoted price. After due consideration, he telephoned to our salesman,

Mr. Davies, and approved this change, urging us to run the advertisement as we had prepared it. Since then some time has elapsed, and a short time ago we were notified that Moffats would not give us credit for their portion of this advertisement and since this amounts to \$204.03 we regard it as a matter of some importance. Neither Mr. Craft nor Mr. Smith will change their last decision in this case without referring the matter to you. It seems obvious that some misunderstanding must have taken place for we are quite positive that approval had been granted for this advertisement by our Moffat representative."

(Exhibit A-AMB 31c)

The matter was then reviewed by officials of Moffats Limited and the General Sales Manager at first replied to Lawson Appliances that the advertisement had not been approved in the form in which it appeared and that he supported the decision not to reimburse Lawson Appliances. The proprietor of Lawson Appliances gave evidence that he took the matter up again with Mr. Winder the General Sales Manager, who had agreed in the end "to split the difference, or something like that, so that we had to let it go at that" (Evidence, p. 488). There are two inter-office memoranda of Moffats Limited dealing with this matter among the exhibits. In one (Exhibit A-AMB 30b) C. R. Smyth wrote that the Moffat representative "approved the ad but did not approve the trade-in allowance". The other (Exhibit A-AMB 29a) states "C.R.S. says that Mel O.K'd the ad, but not the 'Less Trade'." It has been mentioned above that the advertisement contained the words "Less Trade" and also "Plus 30.00 trade".

Regardless of the fact that a compromise was reached, the incident, in our mind, illustrates the Company's endeavour to keep control of advertising price.

The following evidence was given by A. D. Lawson in regard to the manner in which the co-operative advertising plan was operated by Moffats Limited:

- "Q. With reference to cooperative advertising, is it Moffat policy as far as you are aware that when they establish a price for advertising purposes you cannot advertise at less than that price?
- A. That is correct, yes.
- Q. If you show that particular price less trade, would they reimburse you for that particular type of ad?
- A. Yes they would.

Q. Have you always done that?

A. Again that comes back to this business of merchandising which fluctuates for different periods of the year. At a certain period of the year Moffats might deem it advisable to -- this is going back say a year ago -- to not cut their price as much as the dealer organization would like to, for the fact that the opposition and competition is not cutting theirs either; therefore, they would allow the dealer to revert to trade-ins, and therefore the price would be higher, but the dealer would be using the trade-ins for merchandising. Then the situation might become so competitive at the manufacturer's level that they would allow them to do away with trade-ins and use only lower prices."

(Evidence, pp. 484-485)

The perusal of Mr. Lawson's evidence indicates that he did actually advertise at prices lower than prices set by Moffats for advertising purposes. In those instances he bore the entire cost of the advertisement himself. His evidence also indicates that Lawson's Appliances sold Moffat products at the prices it saw fit to determine and that the only actions taken by Moffats Limited were the refusal to make contributions toward the cost of advertisements not approved by the Company and requests made by Moffat salesmen that Lawson Appliances increase actual selling prices to the level of other stores. The evidence of Mr. Lawson on the latter was as follows:

"Q. Has there been any instance in the last year where Moffats representatives have had discovered your prices were lower than any other prices in town, and asked you to come or meet that price level?

A. It has happened.

Q. It has happened this year?

A. Yes.

Q. How many times, several times?

A. Oh no, just from a guess I would say no more than four times.

Q. How about the year before that, were there any instances in that year of the same nature?

A. There we are getting back into things, with such a volume of business and so forth there are many things

that are involved; and when there was a price maintenance some years ago they had stipulated what the price we were to actually sell at, and I can recollect being called on the carpet different times.

Q. But three or four times this past year, when they consulted you about prices, did you accede to their request and bring your price up into line, or did you still maintain your own selling price?

A. Basically, yes. In one case I can remember we did; we are still maintaining a lower price, but they never definitely stipulated that we had to --

Q. That you had to come back up?

A. They suggested it.

Q. They did not make any threats of any nature that if you did not come up your franchise would be cancelled?

A. No, in the last year we have never been threatened by Moffats.

Q. That your goods would be held up or your supplies would be slowed down, or any suggestion of that nature?

A. I cannot recall a threat.

Q. It would be strictly a gentleman's agreement between you and the salesman?

A. That is so.

Q. With no pressure brought to bear on you if you did not accede?

A. No.

Q. But in all three cases you did accede to his request, and in one case you did not?

A. Yes."

(Evidence, pp. 482-484)

B. George's Appliances Limited, Toronto, Ont.

George's Appliances Limited is a large appliance dealer in the City of Toronto and makes considerable use of newspaper advertising in its operations.

On Tuesday, February 16, 1954, George's Appliances Limited, Toronto, published in the Toronto Daily Star a two-page advertisement entitled:

"George's Million Dollar Warehouse Sale"

(Exhibit Q)

The advertisement stated "10,000 appliances to clear at crazy prices!" and almost 50 items were featured on the two pages, 14 somewhat more prominently than the others. Included in the latter were two Moffat lines - a 9 1/2 cubic foot Crosley Shelvador refrigerator, automatic defrost, offered at \$299 - the regular price being shown as \$469, although no model number was mentioned and a 1954 Moffat 40-inch electric range offered at \$288 - the regular price being shown as \$384.50, again no model number was given. Another 1954 Moffat electric range was featured among the other items at a price of \$227 - the regular price being shown as \$309.75 and no model number given.

The representative of Moffats Limited at this time in whose sales territory George's Appliances Limited was located was E. R. B. DeGuerre, who said that he called at the store on the afternoon of February 16, the day the advertisement appeared and found that the store had already sold its supply of refrigerators offered at \$299 and had taken orders for more. Mr. DeGuerre testified, in part, as follows:

"A. . . . Now, at the time this ad ran we did not know about the promotion and the first indication I had was calls from George wanting merchandise.

Q. When would that be?

A. That would be the same day, February 16, 1954. This paper hit the street at 11 o'clock in the morning, and sometimes I don't see it at 11 o'clock in the morning. He was out of stock of the model he had advertised, as at that time.

BY MR. ROSS:

Q. Are you talking about refrigerators?

A. Refrigerators, he was out of stock.

BY MR. PICKUP:

Q. Which refrigerator?

A. It is in Exhibit Q, the Crosley Shelvadore.

BY MR. WENTZELL:

Q. At what price?

A. He advertised at \$299. He did not have any stock of that model on hand at that day.

Q. How do you know?

A. Shortly after the ad ran, later that day and the following morning. I went down to the store on the afternoon of February 16 to discuss this promotion with them, although Mr. George Reisman was away at the time. Because of their inventory position on that model of refrigerators and their sales on it up to that time, I respectfully asked them to remove that portion of the ad in subsequent promotions.

Q. Did you know before you went down to his store that he did not have any of those models on hand?

A. No, I expected he would have models, because he had bought several quantities from us.

Q. He had?

A. Yes.

Q. Then why did you go down to see him?

A. I went down to see him because when a two-page ad of this nature hits the streets in Toronto it is something of a small tornado.

Q. Why did you request him to remove that particular part of the ad from any further promotions?

A. Because he was in an over-sold position late in the day. Late that day, Tuesday, February 16 he was over-sold; and he was only creating a false impression with the consumers reading this paper, and he was only misrepresenting our merchandise to advertise a product which he just couldn't deliver and which at the time, I subsequently found out by contact with the office, that we could not supply him. It was an obsolete refrigerator, a 1954 [sic] model, which we had cleared out to our dealers, a portion of which George had purchased.

Q. And which you were aware of prior to this?

A. We were aware of the purchase, yes, naturally.

Q. That still leaves a doubt in my mind as to why you went to see him after this particular ad appeared. Would you be led to believe that he was over-sold by virtue of the ad itself?

A. No; I wasn't told that by their principal, I was told it by their shipper.

Q. Did they have any of those models that day when the ad broke?

A. Oh yes.

Q. They had some models?

A. They had some models when the ad broke.

Q. And as a result of the ad they sold them all out?

A. As a result of the ad they were in an over-sold position late on Tuesday when I was there; and they were only creating a bad situation by continuing to advertise that model which they were in an over-sold position on and which they could not deliver.

Q. How did you know they were planning to continue to advertise that model that day?

A. They told me at the time.

Q. Despite the fact that they had none on hand?

A. I found out through devious means. They were reluctant to tell me what their future advertising commitments were for this line. It involved an expenditure of \$7,000 in all media. This same ad was repeated in the Telegram the following day, and it was repeated in the Star on February 19, Exhibit T.

Q. You said the following day?

A. It is in the Telegram.

Q. They are tendered as exhibits?

A. I can give you them as evidence.

- Q. You are aware that they did run the same ad?
- A. They ran the same ad in the Telegram with a two-page spread. We have that ad some place. They ran it again on Tuesday, February 23rd, Exhibit R.
- Q. Let us deal with Exhibit T, which was February 19. Is that the particular refrigerator referred to in Exhibit Q, included in the ad Exhibit T?
- A. That is the same refrigerator, although he is using the wrong model number -- 'Automatic defrost' was the same model as in Exhibit Q; that is the same price.
- Q. But is it essentially the same refrigerator?
- A. Identical.
- Q. And you know he had none of those in stock at that time?
- A. Yes.
- Q. That is, shown in Exhibit Q; at which time he was over-sold?
- A. That is true.
- Q. And Moffats were not supplying that model at that time?
- A. No, we were not manufacturing any.
- Q. And they would not have been able to buy it under any circumstances?
- A. At the time of our discussion, that was a fact we could not supply him with any more of that refrigerator.
- Q. Might he have been able to get it from any other dealer in that area?
- A. Not in such quantity as would satisfy his order.
- Q. Has Georges' Appliances committed that sort of act so far as Moffats appliances were concerned prior to this particular advertising, of advertising something they did not have?
- A. Yes sir.
- Q. And was it brought to their attention at that time?

A. Yes.

Q. By whom?

A. By myself.

Q. And what attitude did you take so far as this type of advertising was concerned?

A. My attitude was I did not think it was ethical or good business to promote a model of our products which he was not able to supply. Georges' had previously run ads on an obsolete Moffat product, where he only had one or two in stock. I don't consider a promotion of a full page or so, or any portion of a page showing any model that is not available to the customers, as ethical advertising.

Q. Are you sufficiently familiar with the supply each dealer has on hand in relation to his advertising of those models of Moffats products --?

A. No, but it is good business sense for a dealer to have the merchandise on hand before he promotes.

Q. Were you, as sales representative of the company, sufficiently familiar with each dealer's purchases of any particular model or models in relationship to his advertising of those models?

A. We do have some dealers who are very fair and very close to us, who will discuss a promotion in advance of its appearing in the paper, and will discuss if a model from a stock standpoint is available, and make sure he has an inventory of it before he runs the ad, to protect himself. In this case we were not aware of this promotion at all.

Q. That still does not answer the question I asked. The question I put to you was: Do you as sales representative, either from your business experience or by actually checking the supply of each dealer in your territory from day to day, know whether or not when a dealer promotes a particular model that he has it on hand?

A. I don't make a regular survey of each of our dealers as to their stock position in each model. I only do that when I am calling on the dealer for some business, when I check his stock. When I was working Toronto west at the time of this promotion, and I had about 38 or 40 accounts, it was an impossibility to know at any time what everyone has in stock.

Q. So that prima facie you have no reason, on seeing an ad promoting any particular model, of assuming that maybe the store in question did not have the model on hand; you would assume he did have it on hand?

A. Very definitely.

Q. And only upon checking would you discover that he did not have the model on hand?

A. That is correct.

Q. You would check that personally I suppose?

A. I would check personally; and it comes to my mind now that their shipper, Frank Cullen, had been in touch many times with our office that same afternoon to get that model down to him as quickly as possible, because they needed it badly, and those types of calls are referred to me."

(Evidence, pp. 575-581)

Mr. DeGuerre went on to say that in the absence of the President of George's Appliances Limited the officials with whom he discussed the matter would not take the responsibility of making any changes in the advertisement. However, he heard subsequently that a long distance telephone call had been made to George Reisman and that the latter was returning to Toronto. Other evidence was given that George Reisman was on vacation in Florida at the time.

On February 18, 1954, E. R. B. DeGuerre sent the following memorandum to the Chief Order Clerk of Moffats Limited with a copy to J. O. Wilson:

"This is to advise you as of this date, George's Appliances franchise has been temporarily suspended. Please be sure that all orders for this account are recalled from Shipping Department and that no further orders are processed.

You will have to advise your staff to be diplomatic in handling this situation insofar as quoting delivery and we should continue to accept orders from him if he insists on placing them. However, no commitments should be made on our part with respect to delivery. As far as any models he would want to buy, we are out of stock."

(Exhibit A-AMB 63)

Mr. DeGuerre stated that he gave no indication to George's Appliances Limited that this action would be taken. He then said:

"A. . . . So the reason I took this action in AMB-63 was to withhold further shipments from Georges' until such time as he returned and we could discuss the situation intelligently with him and get some decision from him as to whether or not this was the way he was going to present our product to the public.

Q. You were withdrawing all orders then?

A. Yes.

Q. Not only for refrigerators, but ranges and equipment and what have you?

A. Yes."

(Evidence, p. 583)

The evidence indicates that a meeting between George Reisman and E. R. B. DeGuerre took place on Saturday, February 20. Mr. DeGuerre's evidence in regard to withholding shipments and his discussion with George Reisman on this occasion was as follows:

"Q. Were these instructions actually implemented by Mr. Green, or the orders actually recalled from the shipping department, and were shipments temporarily suspended to Georges' Appliances?

A. We did hold up orders for about two or three days.

Q. And by that time had Mr. George Reisman returned?

A. I didn't see him until Saturday.

Q. And what representations did he make to you upon his return?

A. We discussed the situation, and as I recall it he used the excuse that there was no point in worrying about it at that time because no more ads were going to appear. It was a one-week promotion and everything was finished now.

Q. Did it not in fact appear at a later date than that?

A. Yes sir, it appeared on the following Tuesday.

Q. Despite what Mr. Reisman had undertaken to do?

A. I wouldn't say under oath whether he told me about this ad, but he left the impression with me that it was a

one-week promotion and was quite finished. He could have been talking about a future ad of a different nature.

Q. Was Mr. Reisman aware at that time of any orders being held up for shipment?

A. No sir, I never told him at all.

Q. So far as he was concerned he would never know the difference.

A. He would never know the difference. I discussed the situation with him; he was certainly not apologetic about it at all. I explained to him that it was not our company's wishes or desires that he advertise merchandise or continue to promote merchandise which he did not have available for sale, and also the fact that when he was out of town there should be some responsible person in his organization to make decisions."

(Evidence, pp. 586-587)

The following evidence was given by George Reisman in regard to his discussion with Mr. DeGuerre:

"A. Well, after reaching the south I had to fly back home and held a meeting with one of their representatives on Saturday morning.

Q. Who would that be?

A. Mr. De Guerre.

Q. He is the Toronto salesman?

A. He was Toronto sales representative at that time.

Q. What did he say?

A. We told him we had to receive immediate shipment of that merchandise.

Q. You had your order in at that time?

A. Yes. I had placed an order and they had shipped approximately half of it and refused to ship the balance.

Q. Did they say why they refused to ship the balance?

A. He didn't come out and tell my why. He said they were

out of stock. I insisted that the merchandise be shipped the following Monday.

Q. Was it shipped the following Monday.

A. There was some shipped, in very small quantities."

(Evidence, p. 454)

Evidence was given by E. R. B. DeGuerre that George's Appliances Limited had ordered two carloads of the refrigerators in question toward the end of January, 1954, specifying that one car (about 60 units) was to be shipped immediately and that he did not want the second car until he could accommodate it in his warehouse. Moffats Limited shipped 60 units between the first and second day of February, 1954, and the advertisement first appeared on February 16. In regard to the second carload Mr. DeGuerre said:

"A. He bought two carloads and we shipped one.

Q. The other carload was still available to him?

A. The other carload was available to him on the basis that we had stocked it, but it is not the company policy to hold an order indefinitely particularly on a clear-out model; we are anxious to get rid of it as quickly as possible. If somebody else wants to buy it and pay for it, we will honour his order.

BY MR. PICKUP

Q. Did he ever give you a delivery date for the second shipment?

A. No, there was never a delivery date given for the second shipment.

Q. Did you make further shipments of that particular model to him?

A. Yes, we did at a later date, on the 22nd and 23rd of February; we shipped him five on each day of that model.

Q. How many did you have in stock at that time?

A. On the 23rd of February?

Q. Yes.

A. I couldn't say whether we would have any stock or not. At the time that this promotion [George's advertisement

of February 16] was run we definitely were out of stock. As a matter of fact, our company was in an over-sold position, because we had over-committed ourselves to some dealers for deliveries which we could not fulfil; we had to cancel some orders for that reason. However, every time a promotion of this nature appears we get a cancellation of orders, which probably accounts for the fact that we still had some left in the warehouse on the 22nd and 23rd of February.

Q. Previous to the 22nd of February had you made any inquiries as to the stock position of the company with respect to that model?

A. Yes, we keep --

Q. You personally.

A. Yes. The order department keeps a cardex or a running inventory record of the orders, and as soon [as] an order is accepted, passes credit, and comes back for shipment it is taken off that record in the order department and goes to the shipping department. So that at that time on our office records we were in an over-sold position on that model of refrigerator, although there could easily have been units in the warehouse with orders against them not to be filled; because, from the time an order is placed with us and that unit is put on a truck or a freight car, it could easily be three or four days, sometimes longer if there is a hold-up.

Q. Did you ship any further of that model to Mr. Reisman of Georges' Appliances

A. He ordered some more from us on the fourth day of March -- twelve and eight -- and they were shipped to him on the fourth day of March. There again I would say that we had had a cancellation of those models from other dealers, particularly small out of town dealers, that is where we got those. Because of the very bad taste he created amongst a lot of customers who bought that refrigerator in good faith, he puts us under very strong pressure to get these models; any time we had a cancellation of an order we advised them, and he always got them.

Q. How do you know they were not in stock all the time from February 18?

A. They could have been in our warehouse, but from a

standpoint of stock they were sold and orders were out against them; in the order department we would show an over-sold position, and if I had an order at that time they would not accept it because on their file of inventory they show no units of that model for sale.

Q. Is that all of that model you were able to ship him?

A. Yes sir."

(Evidence, pp. 605-607)

As indicated in the evidence of E. R. B. DeGuerre referred to above the decision of Moffats Limited to withhold shipments to George's Appliances Limited, even temporarily, was not made known to the dealer. Mr. George Reisman gave evidence that he had no knowledge of the actual position of Moffats Limited with respect to available supplies:

"Q. Is it safe to say that Moffats was perhaps the first supplier who refused to ship you goods, or who slowed down your shipments because of your advertising?

A. Well, it is pretty hard to define whether it was an intentional slow down or a lack of stock. That is hard for me to know. For example, all summer they haven't been able to fill the full requirements of our needs. I don't feel that there is any intention or malice on their part; I just don't think they have the supply.

Q. Back in March of this year you were aware that they might have had the supply and they were not shipping to you?

A. I felt they could possibly have had the supply; I had no way of knowing whether they had it or not.

Q. Would that have been '54 merchandise or '53 merchandise?

A. Which period?

Q. Back in March, 1954.

A. That would have been '53 merchandise.

Q. Because, 1954 merchandise would be coming out about that time?

A. Just about that time."

(Evidence, pp. 457-458)

Earlier in his evidence George Reisman had been questioned as to the attitude of Moffats Limited toward his advertising policy:

"Q. As a result of your advertising policy, Mr. Reisman, has there been any time when your franchise has been cancelled by Moffats?

A. Not officially, to my knowledge.

Q. Has it ever been temporarily suspended, shall we say?

A. Not officially, to my knowledge.

Q. Have you always been able to buy merchandise without any difficulty?

A. No.

Q. There have been times when you were not able to buy?

A. That is right.

Q. Do you recall when that may have been?

A. Last February, 1954.

Q. Could you tell the Commissioner if you know why you were not able to buy at that particular time?

A. Well we started sales promotion, and I left that in the capable hands of my brother, and I was away on vacation. When the promotion was advertised and the prices appeared in the paper they did slow down deliveries to us on previous commitments.

Q. That is, you advertised at a price which was substantially below the suggested list price?

A. That is true.

Q. And did they take objection to that?

A. They did, yes.

Q. Why did they take objection at this particular time when I presume you advertised at lower prices prior to that?

A. Will you just rephrase that again?

- Q. You have been advertising at below the suggested list price for some time, I presume?
- A. Yes.
- Q. And was this the first time they had taken objection to your advertising?
- A. No, no.
- Q. It was not the first time?
- A. No.
- Q. This is the first time they delayed shipment of your goods, is that right?
- A. To my knowledge.
- Q. As a result of your advertising policy?
- A. Yes."

(Evidence, pp. 452-453)

On March 1, 1954, DeGuerre's territory was taken over by another salesman, C. A. Marchant, for whose information E. R. B. DeGuerre summarized the characteristics and operations of the various dealers in the territory. That memorandum to his successor, which is dated February 24, contains the following with respect to George's Appliances Limited:

" . . .

George's Appliances Ltd. 842 College St. Tor.
Geo. Reisman - Pres.
Dave Okun, Al Reisman
Salesmen

George's Appl. Ltd. 3030 Dundas St. W. Tor. -
Sid Tannenbaum - Mgr.

George's also have a store on the Danforth which has never been authorized to sell our line. We opened up George's two years ago when he was relatively small in the appliance business in order to give us additional volume in the West end. I think you know how much concern he has caused us with his indiscriminate advertising methods of our products. We have tried to gain his co-operation from time to time. However, George himself is a very cocky, independent, selfish person whom I feel has complete disregard for all of his suppliers

including ourselves. We cannot continue to tolerate his method of advertising our products and it is absolutely essential that we take steps to ignore this account, refrain from calling on him and only ship him the absolute minimum of merchandise. No special deals or carload prices should ever again be quoted him and although in no way can we cancel his franchise, I hope that within six months time he will be so fed up with us, we will be able to legitimately [sic] pull out of this account."

(Exhibit A-AMB 88c)

The evidence does not show that any effect was given to the suggestion contained therein by Moffats Limited. However, George Reisman testified that about 10 days after his discussion with E. R. B. DeGuerre on February 20, he had a second meeting with representatives of Moffats Limited. This would make the time of the meeting about the beginning of March. Mr. Reisman's evidence in regard to this meeting was as follows:

"Q. And for what period of time did this continue, that you were not receiving your full orders?

A. Well, I flew back immediately from my vacation and I returned approximately ten days later, and they were still shipping in small quantities.

Q. This was February of this year?

A. February or the early part of March. I held a meeting with them and came to an arrangement where they would supply our full requirement.

Q. You reached some sort of agreement with them, is that right?

A. Yes.

Q. What was the nature of that agreement? Did you have to give some particular undertaking to them?

A. Yes.

Q. What was the nature of your undertaking?

A. That we would not advertise below a price that was set by their salesmen.

Q. A price set by Moffats?

A. By the sales representative.

Q. And it was not a price that the dealer would agree upon -- it was a price which Moffats would recognize, if the dealer agreed upon that price?

A. Yes, it was something like that.

Q. That was the substance of the arrangement?

A. Yes.

Q. And if you conformed to that particular arrangement they would continue to ship your goods and honour your advertising, is that correct?

A. They would ship the merchandise; advertising was not discussed at that time.

Q. But you were aware that you could claim for your advertising?

A. Provided we advertised at the prices they suggested.

Q. And did you abide by that particular arrangement?

A. We just didn't advertise their products for quite some time.

Q. You did not advertise Moffats products?

A. That is right.

Q. You advertised other products?

A. Yes.

Q. You were able to receive your shipments of Moffats goods, if you wanted them?

A. That is right."

(Evidence, pp. 454-456)

A significant difference between the evidence of E. R. B. DeGuerre and George Reisman appears on the question of what Mr. DeGuerre took exception to in the advertisements which began on February 16. Mr. DeGuerre said that he took exception to that portion of the advertisement featuring a refrigerator at \$299 because George's Appliances Limited did not have sufficient supplies to fill the demand created by the advertisement and the manufacturer was unable to fill George's orders because its stock had been sold out. George Reisman testified that objection was taken to the price at which the article was advertised and that in order to ensure that the

requirements of George's Appliances Limited for Moffat products would be met he had to give an undertaking "That we would not advertise below a price that was set by their salesmen".

Mr. Reisman testified that when E. R. B. DeGuerre had been the salesman calling on him he had had some difficulties with him:

"Q. What kind of difficulty did you have with him [DeGuerre] ?

A. Well he would pretty well shop our store to make sure that our prices were as he suggested.

Q. That is your selling price ?

A. Yes; and of course my staff wouldn't listen to him.

Q. Would your selling prices during that period of time be the same as the suggested list price ?

A. No, no; we would set our own price.

Q. And you would mark the merchandise with your own price ?

A. Yes.

Q. Did he object to this particular price marked on the merchandise ?

A. Yes, sometimes.

Q. Did he endeavour to have you change those prices at all ?

A. He would suggest that it be done, but there was no --

Q. Would he be annoyed with you for not having it done ?

A. I can't decide the man's feelings; I don't know; not to me, he wasn't.

Q. Did he make any threats if you didn't change them, such as he would not ship your goods ?

A. No."

(Evidence, p. 459)

This portion of George Reisman's evidence was read to E. R. B. DeGuerre when he appeared before the Commission and he testified as follows:

"Q. Would you say that evidence is not in your opinion correct?

A. I don't think it is explained very well, sir. With a dealer in a very competitive market such as this, I think I have said before it is impossible to avoid discussion of price and I would certainly at times discuss price with Mr. Reisman or with his sales staff from the standpoint of a good business sense. I am anxious that that man as a dealer of ours buy our merchandise and sell it, and I know that he is interested in making something on it, and I am interested if he does make something on it so that we can have our accounts paid. It is just good business practice, and so I would discuss price, but I have never threatened him in any way or asked him to raise his selling price, which he seems to indicate there. I don't agree with his evidence.

Q. You would be suggesting some price that in your opinion he should be selling his merchandise at?

A. I could suggest a price that I thought with my experience that he should get for our products."

(Transcript, pp. 241-242)

The evidence of George Reisman agrees with that of DeGuerre that the latter, at times, made suggestions as to the prices at which Moffat products should be sold by George's Appliances Limited. DeGuerre testified that, in the discussions with George Reisman or his staff, he did no more than make suggestions although Reisman said that in some cases he considered that DeGuerre was objecting to the price at which a particular product was being sold by George's Appliances Limited.

With respect to the temporary suspension of the shipment of all lines of Moffat products to George's Appliances Limited, the Commission finds it difficult to understand that a manufacturer would take the drastic step of withholding all supplies from a dealer solely because the dealer was running an advertisement which included one product for which the dealer did not have sufficient stock on hand to meet the demand created by the advertisement, particularly in circumstances where the dealer had an unfilled order with the manufacturer even though this had been left open as to date of delivery. This one occasion is explained by the Company as having arisen because of advertising by George's Appliances Limited which Moffats considered misleading to the public and that shipments were withheld pending discussion with the president of the retail business in regard to further publication of the advertisement. It will be recalled that George Reisman had two discussions with representatives of

Moffats Limited in this period, one on February 20 and another at the beginning of March. In the interval DeGuerre had written the memorandum of February 24, quoted above, in which he indicated to the salesman succeeding him the attitude which should be taken toward George's Appliances Limited. In view of the statements made in this memorandum the Commission is of the opinion that the situation created by the advertisements of George's Appliances Limited was used by representatives of Moffats Limited to secure an undertaking from George Reisman that advertising of Moffat products by George's Appliances Limited would be conducted in a manner satisfactory to Moffats Limited particularly with respect to the prices which might be shown in advertisements.

Although the model number of the Crosley Shelvador refrigerator advertised by George's Appliances Limited at \$299 was not given in the advertisement on February 16, the model number CMAE 95 was given in another advertisement during the sale. As Mr. DeGuerre stated in evidence that it was the identical refrigerator in each case it may be taken that this was the model in question. In connection with the promotion plan developed in October, 1953, for the sale of 1953 refrigerators, model CMAE 95 is shown with a retail list price of \$479.75 and an approved advertising price of \$359.75. This model is also listed in E. R. B. DeGuerre's memorandum of April 26, 1954, in which he stated that a price of \$289.00 had been approved for dealers advertising clearance of 1953 products. It may be concluded that the model was still considered sufficiently important at this time to justify establishing an approved price for advertising purposes.

In January, 1954, George's Appliances Limited published advertisements on two occasions which featured Moffat ranges among other products. A claim for \$94.91 covering half the cost of the portions of the advertisements embracing Moffat products was submitted under date of February 16, 1954, to Moffats Limited. The claim was rejected because the prices advertised were lower than any which had been approved by Moffats Limited. On April 13, 1954, E. R. B. DeGuerre wrote to George's Appliances Limited as follows:

"I have your debit note of February 16th regarding Model 1054-53 ads in the Toronto Star, Jan. 8 and 12.

Our advertising policies with respect to co-operative advertising allowance on this particular model were established at \$247.00 on October 16, 1953, and there was no change made until the 15th of February when we agreed to pay co-op on the 3054 at \$239.00.

We regret, therefore, we cannot honour your claim for \$94.91 on the Model 1054 advertised at \$225.00."

(Exhibit A-AMB 326)

C. Ideal Furniture Limited, Hamilton, Ont.

Ideal Furniture Limited conducts a retail furniture and appliance business at 229 King Street East, Hamilton, Ont. The firm was incorporated on May 17, 1949, and prior to that time the business had been operated as an individual proprietorship by the father of Marvin J. Wasserman, who became manager of the store in 1947 and Secretary-Treasurer of Ideal Furniture Limited on its incorporation.

At the beginning of 1953, Ideal Furniture Limited became a franchise dealer of Moffats Limited. A franchise agreement dated January 27, 1953 (Exhibit H-2) was entered at the hearings at Hamilton as the franchise received by Ideal Furniture Limited. This covered "Gas Ranges, Refrigerators (Elec Ranges for Contract Acc only)". However at the hearing before the Commission on May 26, 1955, a letter of March 7, 1953, to Moffats Limited signed on behalf of Ideal Furniture Limited by B. Wasserman, brother of Marvin Wasserman, was entered as part of Exhibit T-27. This letter reads:

"Thank you for your letter of February 28th. However, since the Dealer Franchise Agreement was signed on January 27, 1953, we have been appointed an authorized dealer for Moffat Electric Ranges, irrespective of 'contract only'.

Will you kindly check this change with Mr. J. Wilson and send us a revised Dealer Franchise Agreement and certificate of appointment."

A franchise agreement between Moffats Limited and Ideal Furniture Limited, dated March 12, 1953, was also entered as an exhibit at the same hearing. This covered Moffat electric ranges, Moffat gas ranges and Crosley refrigerators (Exhibit T-26). The agreement of January 27, 1953, had contained the following:

"In consideration of and on acceptance of this application by Moffats Ltd. (hereafter called Moffats) we agree:

1. To actively promote the sale of Moffats products at established retail prices, selling only to consumers or users and in accordance with the sales, advertising, and service policies of Moffats, as established from time to time."

The agreement of March 12, 1953, had the following wording:

"In consideration of and on acceptance of this application by Moffats Ltd. (hereafter called Moffats) we agree:-

1. To actively promote the sale of Moffats products selling only to consumers or users and in accordance with the sales, advertising, and service policies of Moffats, as established from time to time, but nothing herein shall be construed as requiring or inducing us to sell at retail prices suggested by Moffats. "

In his evidence, Marvin Wasserman said that he did not remember that a revised written agreement had been made between Moffats Limited and Ideal Furniture Limited but he was aware that the full line of Moffat products had been made available to Ideal Furniture Limited for sale in its store from an early period in its dealership. Marvin Wasserman stated in evidence that Ideal Furniture Limited had had a limited franchise at the start because J. O. Wilson, representative of Moffats Limited for the Hamilton district at the time, had placed the store "on probation". The exact length of this period was not stated by Marvin Wasserman but he said that it went beyond March 12, 1953, the date of the second franchise agreement. In regard to the probationary period Marvin Wasserman stated in answer to counsel for Moffats Limited:

"Q. Isn't it a fact that at all times throughout your Moffat franchise you were free to sell in your store at any price you wanted?

A. No.

Q. When was that not true?

A. The probationary period Jim [Wilson] said if he would catch us he would cut us off.

Q. And after the probationary period is it not true that you could sell at any price you want?

A. After the probationary period we could sell at any price we wanted as far as we were concerned in the store, but we had to advertise what they told us to advertise. "

(Transcript, p. 175)

The franchise of Ideal Furniture Limited was cancelled by Moffats Limited on May 21, 1954. Official notice of such cancellation was sent by registered mail to Ideal Furniture Limited on that date signed by the Company's salesman in the Hamilton area, M. C. Staynor, and read as follows:

"Further to my personal visit to you on Thursday, May 20th, and in view of the discussion we had, and the point raised, I have to advise you that we are closing your franchise as from this day.

If at some future day I find that it would be to our mutual benefit to confer with you on re-opening your franchise, please be assured that every consideration will be given you."

(Exhibit H-5)

The situation which led up to the cancellation was described as follows by C. R. Smyth, General Sales Manager of Moffats Limited:

"Q. Were you made fully aware of the situation in Hamilton by Wilson?

A. I was made aware of it. Wilson came to me over the difficulty he had had with Ideal Furniture over the past months from a credit standpoint; and we had also had difficulty on numerous occasions with him ordering a carload and taking delivery of some of the merchandise and then cancelling the rest and obtaining the benefit of our carload discount. He had been discussing with me for some time the fact that he wanted to open another account in Hamilton, which he felt offered him more volume and potential than Ideal Furniture offered him. To that extent the account was discussed with me. I told him at that time that if they were concerned about his credit and they wanted to establish a better outlet, that they should go ahead and do so.

Q. He had authority to cancel?

A. Yes, he had authority as division manager.

Q. And you backed him up?

A. Yes."

(Evidence, pp. 209-210)

The credit aspect of the dealings of Moffats Limited with Ideal Furniture Limited appears to have been the matter of delay in payment of accounts which was complicated by allowances claimed for the return of parts under the manufacturer's warranty. Miss Frances Pargeter, Credit and Collection Manager of Moffats Limited, gave the following evidence:

"Q. Did you experience any difficulty creditwise with Ideal Furniture account in Hamilton?

A. Yes.

Q. Would you please tell the Commissioner the nature of your difficulty with that account?

- A. It was a question of collecting the account promptly.
- Q. It was a matter of promptness?
- A. Yes.
- Q. Was there any doubt in your mind as to his ability to pay his account?
- A. That was evident in the manner in which he was paying the account; he was shy of working capital at that time.
- Q. And you think, in your opinion, that he was actually in financial difficulties, shall we put it that way?
- A. He was short of working capital at that time; he couldn't pay his account promptly or he didn't.
- Q. It was not a matter of trying to balance out his invoices with your statement, that he was experiencing difficulty with?
- A. There were mechanical difficulties too.
- Q. There were mechanical difficulties?
- A. Yes. I did send my assistant up to try and help him out.
- Q. Who was your assistant?
- A. Ross Warnes.
- Q. What happened as a result of this Mr. Warne's visit to Ideal.
- A. Not very much; we did not get the account cleared up to our satisfaction.
- Q. Did he make a full report on his return?
- A. Yes.
- Q. What did he report to you, in substance?
- A. We do have a very large volume of repairs, service parts; those are the accounts that give us the most difficulty in trying to clear the return of them.
- Q. You mean the service parts -- ?

A. Yes, that come back for replacement.

Q. That is what fouls up your overall invoice picture?

A. Yes.

Q. And was Ideal Furniture experiencing difficulty as a result of these service matters?

A. Let us say that there seemed to be a misunderstanding between the two accounting departments.

Q. That is Ideal Furniture and Moffats?

A. Yes. We could not come to a decision on the return of some of the parts. The dealer there claimed that he returned the parts, and unless he can prove by signature that they did leave his establishment and were received by us we don't give him credit for them. That is, on the defective parts returned. I would classify that as mechanical difficulties in a ledger account.

Q. Was Ideal Furniture at that time claiming [credits] from the return of service parts?

A. Yes, quite a large volume in their account, and it would date back months.

Q. Is that a normal situation with dealers, as to the return of parts?

A. Yes; with some dealers more than others. Some dealers have a very large service business, therefore they are purchasing a large number of service parts from us.

Q. That would be replacement parts?

A. Replacement parts; and we do have difficulty with all of the dealers.

Q. You would credit them with the parts that they returned, is that correct?

A. Yes; we would if, in our judgement, the parts were defective.

Q. And Ideal Furniture were experiencing some difficulty at that time over these defective parts?

A. Yes.

Q. Which they claimed credit on?

A. Yes, that is right.

Q. Were they also experiencing difficulty matching their invoices against your statement?

A. They shouldn't have; if they took the statement every month as we sent it out to them, and matched it up with their invoices, all they had to do is write and ask us for copies if they didn't have them, or phone, as he often did.

Q. Did Mr. Wasserman phone you personally many times?

A. Yes."

(Evidence, pp. 510-513)

Other points of difference which had arisen between Moffats Limited and Ideal Furniture Limited related to certain advertising practices engaged in by Ideal Furniture Limited. The following evidence was given by J. O. Wilson in regard to objections he had taken to actions of Ideal Furniture Limited during the time he was employed by Moffats Limited:

"Q. Mr. Wilson, do you recall a year ago last fall if you had difficulty with Ideal Furniture over their advertising slogan, 'We will meet or beat any price in town'?

A. Yes.

Q. Do you recall the details of that? Do you recall any representations being made to Ideal about the use of that type of slogan?

A. Yes, we had quite a meeting about that. We may have had two -- the one in March, that was on the new product presentation. At that meeting there was some very awkward situation, which led me to the second meeting in September, which was program, and which has been outlined here today. The first meeting, the one in between, I can't remember the date of it.

Q. That is one between March and September?

A. Could have been the first in September, but probably between March and September sometime. The point was that several dealers were objecting to this type of advertising that had been going on in that area, such as give-aways with no relationship between them and the

product itself -- that is, it had nothing to do with the appliance being sold. And there was also the fact that Ideal, as an example, had used some terminology, for instance, that they had hooked up more Moffat ranges than any other dealer in the Hamilton area. That was a fact, but it was a little misleading. The point is that the father of the present owner of Ideal Furniture operated out of that same outlet, and had a contract with Hydro for years to hook up ranges, and in turn Ideal Furniture used it by saying that his store had hooked up more Moffat ranges -- inferring that he had sold more Moffat ranges than any other dealers. The dealers, who were big organizations, were disturbed to think that this little guy [who] was just an upstart was telling the public that he had sold more merchandise than they had. This actually was not true; the other organizations had sold more quantity than Ideal had.

Another thing was that Ideal had the happy faculty of hooking into a national promotion and getting space on the paper right on top of a national ad placed in the paper by the Moffat company. This activity on the part of Ideal Furniture was disturbing to the other dealers.

Another scheme of Ideal Furniture was to advertise, 'We will meet and beat any price in town'. In other words what he was doing was getting the people to shop around in the other stores, and whatever price they ask, the people were to come to Ideal and he would give them a lower price. His techniques were unethical.

Q. Did you raise any objection to him on that basis?

A. Yes I did sir."

(Evidence, pp. 408-410)

Several Moffat dealers in Hamilton who gave evidence in the inquiry stated that they had taken objection to the advertising practices of Ideal Furniture Limited.

According to the evidence of H. C. Darroch, Vice-President of Moffats Limited, when dealer announcements accompany a national advertisement of the manufacturer, all dealers should have the same amount of newspaper space. His evidence, in part, was as follows:

". . . In connection with this dealer in Hamilton, Ideal Furniture, there was one other reason, and we have an illustration of this point. He was doing things in advertising that was losing us business through other dealers. For instance,

when we run a national ad of our own featuring some products we ask our dealers to tie-in along the bottom of the ad with their names, so that the public can know where to buy these products. That is customary; in fact, our policy is that our dealers' names will appear in the same size below the ad.

BY MR. WENTZELL:

Q. Is that what they call a 'hooker'?

A. Yes, a hooker. So that all dealers will get the same amount of publicity and be all treated the same as regards the national ad. What he did in Hamilton by arrangement with the newspaper - and most newspapers would never have allowed it - is what we call stealing the ad, by taking a section right along the top of the ad with his name in big print, making it appear that the whole ad was for his store. Most newspapers would not allow a dealer to do that. They know it is contrary to the manufacturer's policy, but it happened in Hamilton.

Q. The dealer pays for his own hooker, is that true?

A. Yes, in order that we may treat the dealers all the same. It ties in with the national ad, and the names are supposed to be identically the same size; they can put their names in any way they like it, but the size or space that it takes is supposed to be the same, so that all dealers will get benefit from our ad. This man went in and by some subterfuge got the paper to do it, and he stole the whole ad, so that it appeared to be his ad.

Those are things in which we say the dealer is not cooperating with us. He is kicking our product around and using it to his own advantage, and not cooperating."

(Evidence, pp. 34-36)

In spite of objections which were taken to the form of advertising of Ideal Furniture Limited, Marvin Wasserman stated that he had always applied under Moffats co-operative advertising plan, for a portion of the cost of advertisements featuring Moffat products and had always had his claims accepted by the Company.

Efforts to have Ideal Furniture Limited discontinue the use of the slogan "We will meet or beat any price in town" were made by the Moffat representative for the Hamilton district sometime prior to April, 1953, soon after the store became a Moffat dealer. Marvin Wasserman stated that J. O. Wilson told them that the slogan could not be used and that they would have to follow the Company's advertising policy or lose their dealership. Ideal Furniture Limited

then gave up the use of the slogan but on April 20, 1953, an advertisement for Ideal Furniture Limited appeared in the Hamilton Spectator and this had a slogan "I'll beat any price in town". However, the wording of the advertisement had been prepared by the Retail Advertising Manager of the newspaper without the authorization of Ideal Furniture Limited. The former stated in evidence that a day or two after the advertisement appeared he was asked on the telephone by Marvin Wasserman to speak to J. O. Wilson, representative of Moffats Limited, about the insertion of the slogan and he explained the circumstances to Wilson who requested him to telephone other Moffat dealers in Hamilton and tell them that the slogan had not been authorized by Ideal Furniture Limited. This he had done.

The next incidents involving Ideal Furniture Limited which are clearly indicated by the evidence occurred shortly after the appointment of a new Moffat dealer in Hamilton about the latter part of April or beginning of May, 1954. The appointment of the new dealer, Zack's Powerhouse Limited, was apparently made by Moffats Limited without the other Hamilton dealers being informed by the district Moffat salesman, M. C. Staynor. When it became known that Zack's Powerhouse Limited would be publishing a newspaper advertisement featuring Moffat products strong exception to the appointment of the new dealer was taken by some of the other Moffat dealers in Hamilton, particularly Ontario Home Furnishings Limited and Ideal Furniture Limited. Ontario Home Furnishings Limited informed M. C. Staynor that the store would no longer deal in Moffat products and would sell off such merchandise in stock at reduced prices. M. C. Staynor said, in evidence, that he attempted to dissuade Ontario Home Furnishings Limited from following this course and offered to buy back its stock of Moffat products. With this in mind he took an inventory of Moffat goods in the hands of Ontario Home Furnishings Limited on April 29, 1954, but the store followed the course earlier indicated and published an advertisement to sell off its stock of Moffat products.

At one stage M. C. Staynor had approached Marvin Wasserman of Ideal Furniture Limited to see if the latter could effect any change in the attitude of Ontario Home Furnishings Limited but Staynor stated that later he had asked Wasserman not to do anything. However Staynor told Wasserman of the impending advertisement of Ontario Home Furnishings Limited and suggested that Ideal Furniture Limited make no attempt to compete in advertising with the former's clear-out sale. While Ideal Furniture Limited did not publish an advertisement at this time offering Moffat products at specific reduced prices an advertisement was published in the Hamilton Spectator of May 3, 1954, directly above a national advertisement of Moffats Limited, containing the following wording, in part:

"Only \$5 down delivers
Nobody Beats Ideal
See Ideal-Headquarters for new
1954 Moffat Ranges
Ideal has installed more Moffat
Ranges than all other Hamilton
Dealers Combined!"

(Exhibit H-24)

The situation in Hamilton led to J. O. Wilson, then Ontario Sales Manager of Moffats Limited, asking M. C. Staynor to arrange a meeting with Hamilton dealers on May 6, 1954, which Wilson attended. Among those invited to attend this meeting was Marvin Wasserman of Ideal Furniture Limited who, after going to the place of meeting, left before the meeting began.

The evidence is not clear as to what occurred at the meeting of May 6, but Manuel Zack, President of Zack's Powerhouse Limited, who was present throughout the meeting stated that among the first remarks made by J. O. Wilson was that the franchise of Ideal Furniture Limited had been cancelled. Further evidence of Manual Zack was as follows:

"Q. Were any reasons given by him for the cancellation?

A. Yes, my understanding was that Mr. Wasserman had been phoning people who were, shall we say, higher in the group than Mr. Wilson, that he had gone over his head in terms of calling some of the -- I don't know how you would describe it -- he had called the top executives of the group. Mr. Wilson was determined, since he was sales manager for Ontario, to appoint dealers as he saw fit; he was going to accept no dictation from any individual dealer as to whether or not a new dealer should be appointed.

Q. Was Mr. Wasserman calling the top executive on account of your appointment as dealer?

A. My understanding was that was the reason."

(Evidence, p. 820)

In his evidence about the meeting, J. O. Wilson described his reference to Ideal Furniture in the following way:

"A. I suggested to Mr. Yolles [Vice-President, Home Outfitting Co. Ltd.] that Mr. Wasserman of Ideal Furniture would no longer be a franchised outlet of

Moffats, if he continued to stand on the ground that he was employing at that time -- that was, that he was not going to buy Moffats merchandise; he was no more interested in promoting Moffats name, and that he wanted to talk to Don Moffat personally in order to get a satisfactory explanation as to why Zack's Power House was opened without his permission or knowledge."

(Evidence, p. 393)

Later in his evidence Mr. Wilson said:

". . . I had Mr. Staynor arrange for the meeting, and I was going to tell them what the situation was and apologize for it. That is what led up to this point when, during the middle of this apology, Mr. Yolles said, 'What about these guys who haven't showed up?' That, by the way, was three -- there was Dominion Furniture, Ontario Furniture and Mr. Wasserman of Ideal. He asked, 'What about these guys that didn't turn up?' I said, 'If they put that ultimatum up to me that they are not going to do business with us, I am sorry to say that I have no alternative but to cut them off. I am not going to stand around and sacrifice a franchise for somebody else, if they don't want to do business with us.' Then he said, 'We have heard that before; you are not going to cut off the big dealers.' I said, 'Wait a minute. We are not shipping anything to Ontario Furniture because they have refused to handle any of our products.' He said 'What about the other guys?' I said 'If they feel the same way, I will cut them off.' The argument led on from there; they did not think I was stating the truth; they thought I was lying to them. I got mad, and it all came up to that point."

(Evidence, pp. 399-400)

Evidence given by some dealers who attended the meeting was to the effect that there had been some comment on the advertising methods followed by Ideal Furniture Limited but it was not made clear that any comments in this connection were made by representatives of Moffats Limited. It may be assumed that such comments would be directed to the advertisement of Ideal Furniture Limited on May 3, 1954, which is referred to above.

The day after the meeting of May 6, 1954, M. C. Staynor visited Ideal Furniture Limited. In his evidence, Staynor said that he called on Marvin Wasserman to inform him what had happened at the meeting because Wasserman had not been there. It would seem most likely, therefore, that Staynor would have informed Wasserman of the attitude expressed by J. O. Wilson toward the continuance of Ideal Furniture Limited as a Moffat franchised dealer. It would also appear likely that Staynor in describing the meeting to Wasserman would refer to the comments made by other dealers on

the recent advertisement of Ideal Furniture Limited.

Marvin Wasserman's account of the interview with M. C. Staynor was as follows:

- "Q. And Mr. Staynor came in your office the next day, is that correct?
- A. Yes.
- Q. What did he say to you?
- A. He told us they were taking the agency away from us.
- Q. Did he give you any particular reason at that time?
- A. Yes, for participating with price cutting.
- Q. In that one particular ad referred to?
- A. That was the only ad. That was the ad they were referring to at that time. He indicated that Jim Wilson was always after us and that they were through, that is all, for going along with it.
- Q. This particular ad was enough for them?
- A. That was the end.
- Q. And that your franchise would be cancelled?
- A. Yes.
- Q. Was it in fact cancelled?
- A. Not at that time."

(Evidence, pp. 664-665)

An employee of Ideal Furniture Limited, J. A. Deloughery, gave evidence that he was present during the conversation between Staynor and Wasserman. His evidence, in part, was as follows:

- "A. . . . It was then that Mr. Staynor informed Mr. Wasserman that at a meeting at the Connaught Hotel the previous night his company decided to cancel our franchise on account of the way we were advertising and the way we were price cutting.

- Q. The way you were advertising and the way you were price cutting?
- A. Yes. He also informed Mr. Wasserman not to do anything at the moment, that he would try to smooth things over with Jim Wilson.
- Q. Did you know who Jim Wilson was?
- A. Yes, I knew who he was.
- Q. Was anything further said at that particular time?
- A. At that particular time he also remarked that any other store in Hamilton, if they did not adhere to the way Moffats wanted it, they would also lose their franchise.
- Q. If they did not what?
- A. If they did not adhere to their way, as regards prices.
- Q. That is, advertising prices?
- A. Yes.
- Q. That the other Moffat dealers in town would lose their franchises as well?
- A. Yes.
- Q. And he said that in your presence, is that correct?
- A. That is correct."

(Evidence, pp. 679-680)

M. C. Staynor emphatically denied that he ever told any one connected with Ideal Furniture Limited that he was "cutting them off or contemplating cutting them off for price cutting."

As already indicated formal action was not taken by Moffats Limited to cancel the franchise of Ideal Furniture Limited until May 21, 1954. M. C. Staynor said in evidence that while consideration had been given for some time to the cancellation of the franchise of Ideal Furniture Limited and to the granting of a franchise to Adler's Furniture House Limited he did not come to a final decision on both matters until after the middle of May. On May 20 he called again on Marvin Wasserman and informed him that the franchise of Ideal Furniture Limited was being cancelled.

Marvin Wasserman gave the following testimony in regard to the reasons for cancellation offered by M. C. Staynor during the visit on May 20:

"A. He [Staynor] said he had talked to Jim Wilson, and they just didn't want to go along with us any more because of the way we were cutting prices and disrupting the city. I again repeated that he couldn't cut us off because of the Act; and he told me that they could find excuses to cut us off, different from the Act, such as our credit being no good, or not looking after customers, or not displaying merchandise properly -- they could find other excuses to cut us off except for cutting prices."

(Evidence, p. 671)

J. A. Deloughery testified that he was present during part, at least, of the interview between Wasserman and Staynor on May 20 and that Staynor had said in his presence that the franchise of Ideal Furniture Limited was being cancelled because of price cutting. Mr. Deloughery also stated that Ideal Furniture Limited was not publishing any price cutting advertisements at that time.

That he gave such reasons for the cancellation of the franchise was emphatically denied by M. C. Staynor who stated:

"A. Well, I never told Ideal Furniture or Marvin Wasserman or anybody else of the organization that I was cutting them off or contemplating cutting them off for price cutting. At the time that I went into Ideal Furniture and saw Marvin Wasserman and finally told him that I had - that I was revoking his franchise, I gave him the reasons why I was revoking his franchise. The reasons were two. The first was that we were not very pleased with his credit position; and secondly that I was appointing a larger dealer about half a block away from him by name Adler's Furniture House.

Q. And when would that occasion be?

A. I would say that last occasion was the day before I wrote him the letter cancelling his franchise . . ."

(Transcript, p. 123)

An appraisal of the evidence relating to the cancellation of the franchise of Ideal Furniture Limited does not show conclusively why the action was taken by Moffats Limited. It is evident that delay by Ideal Furniture Limited in the payment of Moffat accounts had been a matter of concern on the part of company officials for some

time. It is also clear that the tactics of Marvin Wasserman in taking advantage of Moffat national ads to feature his own business while other dealers were limited to a small display card under the advertisement had been a cause of annoyance to other dealers and was regarded as unethical by Moffats Limited. It also appears that the strong objections which Marvin Wasserman took to the appointment of Zack's Powerhouse Limited as a Moffat dealer and his efforts to go over the head of the Ontario Sales Manager to present his objections were displeasing to J. O. Wilson who had authority to cancel a franchise for any reason other than price cutting. The evidence establishes that Ideal Furniture Limited had not been publishing any advertisements featuring Moffat products at reduced prices in the period preceding the cancellation of its franchise. While Marvin Wasserman construed the slogan in the advertisement of May 3, 1954, "Nobody Beats Ideal" as a form of advertised price cutting it would appear that such a slogan would be regarded by a prospective customer more as an advertising claim than as direct price cutting. It also appears that the placing of this advertisement prominently above the Moffat national advertisement and the claim in the Ideal advertisement that it had installed more Moffat ranges than all other Hamilton dealers combined would be strongly resented by other Moffat dealers in Hamilton.

In the face of the reasons advanced by Moffats Limited for the cancellation of the franchise of Ideal Furniture Limited and the evidence as to the experience of the Company in dealing with Ideal Furniture Limited in regard to matters other than those related to the resale prices of its products the Commission has not been convinced that the action of the Company in withdrawing its franchise on May 21, 1954, was taken because of refusal on the part of Ideal Furniture Limited to resell or offer for resale Moffat products at prices specified by the manufacturer or at a price not less than a minimum price so specified.

CHAPTER V

APPRAISAL OF THE EFFECTS OF PRACTICES OF MOFFATS LIMITED IN RELATION TO SELLING PRICES

1. Attempts by Moffats Limited to Control Prices in Advertising

In the opinion of the Commission the evidence in the inquiry relating to the period under review, namely the years 1952, 1953 to June, 1954, shows that Moffats Limited throughout this period attempted to control the prices at which its products would be advertised by its retail dealers. It is also the opinion of the Commission that the co-operative advertising plan of Moffats Limited was employed by the Company as an integral part of its policy of attempting to keep control of advertised prices of its products.

While various instances of dealers publishing advertisements of Moffat products containing prices lower than those approved by the Company were included in the evidence presented to the Commission, the evidence makes clear that the policy of the Company was to endeavour to control the advertising of prices of Moffat products by dealers. It was contended on behalf of the Company that communications among company officials relating to advertising of prices should be interpreted as referring only to co-operative advertising prices even though this is not specifically indicated. In the case of some such documents such an interpretation appears to be the proper one but the documentary evidence, as a whole, convinces the Commission that Moffats Limited attempted in the period under review to keep control of advertising of prices of Moffat products by its dealers. Certainly from the evidence of George Reisman, President of George's Appliances Limited, it is apparent that he was convinced that the assurance of a supply of Moffat products was dependent upon his agreeing not to advertise Moffat products at prices lower than those set by the Moffat salesman and he came to an arrangement with Moffat representatives embodying this condition.

For a time in the summer of 1953 a distinction was made by Moffats Limited between advertising of new models and advertising of models introduced earlier. In a memorandum of July 31, 1953, to Toronto salesmen, C. R. Smyth, then Ontario Sales Manager, wrote ". . . we do not want, under any condition, to have this new line of ranges advertised at other than our suggested retail list price. However, we will allow ads on our present line." He concluded his memorandum: "Therefore for the month of August at

least we will allow ads other than national type ads to be run by dealers, but we will not pay co-operative advertising on these ads" (Exhibit A-AMB 330). It is incredible that a senior company official would inform salesmen that they could "allow" advertisements on which no co-operative advertising contribution would be made unless the salesmen had been endeavouring to control all advertising of prices of Moffat products. Somewhat similar wording was used by C. R. Smyth, after he became General Sales Manager, when writing to J. O. Wilson, then Ontario Sales Manager, on April 14, 1954. In this memorandum C. R. Smyth wrote:

"Under no circumstances, without a prior meeting with yourself, E. DeGuerre and myself, will you authorize or allow cut-price advertising on our 1954 line."

(Exhibit A-AMB 46)

In his evidence C. R. Smyth stated that in this memorandum he was referring only to co-operative advertising but other evidence leads to the conclusion that the policy of Moffats was directed to advertising of prices under the co-operative advertising plan and otherwise. On March 3, 1954, C. R. Smyth had written to J. O. Wilson reporting that the representatives of a department store in Toronto were "very bitter at the prices which are being offered in Toronto" and telling Wilson "Just as quickly as possible you will have to bring the dealers in line, . . ." (Exhibit A-AMB 42). The wording must clearly have related to the prices then being advertised by dealers and not only to prices which had been approved by the Company for co-operative advertising purposes.

In a memorandum of February 24, 1954, E. R. B. DeGuerre, a sales representative of Moffats Limited, who was then being moved from one district in Toronto to another, described for his successor the characteristics and operations of the various Moffat dealers in his old territory. In referring to one dealer who was said to have worked very closely with the Company, E. R. B. DeGuerre wrote:

"In this respect, they have run two unauthorized ads recently which I have severely reprimanded them for and it will be necessary to keep them in line as far as our advertising policies are concerned without dampening their enthusiasm."

(Exhibit A-AMB 89f)

When asked what was the nature of his reprimand, E. R. B. DeGuerre said in evidence:

"A. . . . I was telling him he was foolish to run big ads which were very costly to him -- \$1,025 in the Toronto

Star -- on which he would get no co-op, just for the satisfaction of his own mind in spiting some other dealer. I was suggesting to him that he would be better to keep his money and stay out of the newspaper and make a profit. That is what I mean by 'reprimand.'"

(Evidence, p. 596)

It is difficult to understand how comments of this kind could be described as a severe reprimand. There is the further point that in the memorandum cited above the salesman succeeding to the territory was being told that it would be necessary to keep the dealer in line with the Company's advertising policies. This would indicate that the writer believed that efforts along this line could be successfully attempted.

Direction of policy toward keeping dealers on a common basis of advertising is indicated in the memorandum of H. C. Darroch, Vice-President of Moffats Limited, written on March 25, 1954, in which he said in regard to "Advertised prices of 1954 models":

"The dealers in Toronto have agreed with us on the prices at which they will advertise our current model ranges and to date, no dealer has advertised lower than these prices. This situation is being very closely watched."

(Exhibit A-AMB 37)

Mr. Darroch said that this memorandum referred to the time when new models were introduced and dealers were asked not to advertise them at other than the suggested retail price until stock was in the hands of all dealers. His recollection was that, in fact, some dealers did advertise the new models at cut prices. While Mr. Darroch testified that no threats of any kind were made when dealers were requested to observe the prices suggested by the Company there was clearly an attempt to have the dealers follow such prices in their advertising of Moffat products.

When R. J. Barrie, a Moffat sales representative for one district in Toronto, was asked whether the retailers he called on discussed the content of proposed advertisements with him he testified that in most cases they did. The witness was questioned as to discussion with retailers in regard to the prices of Moffat products to be shown in advertisements and he gave the following evidence:

"Q. That is it, if the price he was suggesting he run that ad at was below your suggested advertising price, would you advise him that he would not get Co-op on it?

A. Well, it might develop that way, that I would have to say, 'Well, here is the co-operative, at least, suggested

co-operative advertising price, which you are free to use or ignore, it's up to you', and he would automatically know then that he is either interested in running his own ad at his own price or interested in running an ad at the co-operative price.

THE CHAIRMAN: That is, after price in that connection was discussed it would become clear whether or not he was going to get co-operative or likely to get co-operative?

A. I think from what I have said that would be fairly clear, yes."

(Transcript, pp. 221-222)

2. Significance of Advertised Prices as a Method of Selling

It was strenuously argued on behalf of Moffats Limited that the advertising of an article at a price did not constitute the sale of the article and that advertised prices and selling prices were not necessarily the same. In the opinion of the Commission no such distinction can validly be made between the advertising of an article at a price and its sale. The advertising of an article at a price is an offer to sell at that price, and in view of the Commission is a direct part of the selling process. Any attempt to control the advertised prices of such articles as electrical appliances is necessarily an attempt to control the resale price of the articles. The fact that under present-day merchandising practices the advertised price and sales price cannot be divorced in the manner contended on behalf of Moffats Limited is borne out by references in the documents of the Company. In the minutes of a meeting between dealers and Company representatives on April 23, 1954, E. R. B. DeGuerre wrote that "Promoting dealers all want their ads to pay off and are going to advertise brand merchandise at the best possible price on a co-operative basis if possible. . . . Therefore, an advertising price that is competitive with other makes and offers good value and will sell our product must be established" (A-AMB 336c). It will be noted that the advertising price is referred to as one which "will sell our product". In a talk prepared for a meeting with dealers on February 24, 1954, J. O. Wilson then Ontario Sales Manager of Moffats Limited stated:

"... The customer won't come into the retail store unless the price is right. . . . So you give the customer what he wants. LOWER PRICES. The IRONY of this fact is that when you sacrifice your profit in order to sell the manufacturer's product, the manufacturer won't co-operate on the ad because you are below the suggested list price."

(Exhibit A-AMB 18 [48])

The significance given to the advertised price had been shown in correspondence relating to the promotion sale of Crosley refrigerators in the latter part of 1953. The Montreal manager of Moffats Limited had reported that when a department store in that city had advertised in connection with the promotion only three had been sold. He then sought permission to arrange co-operative advertising with four dealers at lower prices which would be approved by the Company.

During the proceedings before the Commission four Moffat dealers from Toronto were called by the Company to give evidence as to certain advertisements which they had published featuring Moffat products and as to the prices at which some articles featured in such advertisements had been sold about the time of the said advertisements. It was indicated that such advertisements although showing prices lower than the original retail list prices had been approved for co-operative advertising purposes by Moffats Limited. The sales invoices which were produced showed that the actual prices at which sales had been made were lower than the prices shown in the related advertisement. From this it was argued that advertising prices and sales prices were not necessarily the same.

The fact that in any particular instance the price at which an article is sold is lower than the advertised price does not mean that the two prices are not related and that the advertised price does not govern the actual sales price for all practical purposes. The situation that a customer who gives a "good song and dance", as one witness put it, may be able to make a purchase for somewhat less than the advertised price does not mean that others will not be sold at the advertised price or that the sales price will not be kept in close relationship to the advertised price.

An examination of the advertisements of the four Toronto dealers referred to above indicates that some variation from the advertised price might have been expected. In argument four advertisements of the first dealer were referred to as being related to the sales invoices. One of these advertisements informs the reader that he may save \$120 on the refrigerator advertised "Plus Liberal Allowance on Your Present Refrigerator" (Exhibit T-2). Another advertisement states "Plus Liberal Allowance for Your Old Refrigerator" (Exhibit T-3). The same wording is used in another advertisement of the same article (Exhibit T-4). The fourth advertisement referred to has this wording "Liberal Trade-in Allowance For Your Old Refrig or Icebox" (Exhibit T-9).

Four advertisements were also referred to in the case of the second dealer. These contain such phrases as: "Less Trade-In Allowance" (Exhibit T-11); "Huge Trade-In Allowance" (Exhibit T-12); "'Myer the Buyer' Wants Your Old Range He Pays the Best Price" (Exhibit T-13); "the Biggest trade allowance in town on your old washer" (Exhibit T-13).

In the case of the third dealer only one advertisement was referred to. This contained the phrase "No Trade-In Required" (Exhibit T-19). In the case of the fourth dealer the advertisements contained such phrases as "Less Liberal Trade-In Allowance" (Exhibit T-23) and "Less Generous Trade-In Allowance" (Exhibit T-24).

Under the sales practices currently prevailing in the merchandising of electrical appliances it is recognized that the offering of a trade-in allowance usually means that the customer may expect to make a purchase for a somewhat better price than that set out in the advertisement. This is borne out by the comment in the minutes of the meeting on April 23, 1954, referred to above, on the advertising price of a washing machine. The minutes state:

"Price of \$249.00 less trade-in allowance seemed to be a more practical basis which would mean the washer would be sold at a figure of \$219.00 to \$229.00 on the sales floor."

(Exhibit A-AMB 335b)

In certain instances among the examples cited the sales embraced what are known in the trade as "double-headers", that is, the sale of two articles at the same time to the same customer. It is generally recognized that a better price may sometimes be secured by the customer making such a combined purchase.

While an offer of a generous or large trade-in allowance is one merchandising practice employed in the appliance trade, the outright announcement of the selling price appears to be the one which has the most significant competitive effect. This is probably among the reasons which has led Moffats Limited to make such sustained efforts to control the advertising prices of its dealers. One of the large dealers in Toronto, C. S. Lewis of New Era Home Appliances Ltd., who was called as a witness by Moffats Limited, testified that in some cases his salesmen had discretion to reduce prices to a limited extent. He gave as an example a maximum reduction of about \$15 on a \$300 article. Later in his evidence he said:

"A. That only applies, I would say, roughly, where the salesman can go down, I will say roughly on about not over fifteen per cent of our merchandise.

Q. The other eighty-five, the price in the ad is the price?

A. The price is it, the low is on it. For the simple reason, our traffic is so heavy, we want people to come in and get our price right there because if we can't wait on them immediately they will look at it and see it,

\$289.00, and they say 'It's \$279.00 at Joe's down the street' and they walk out. . . ."

(Transcript, pp. 43-44)

It is obvious that in the retail appliance trade as in many other lines of trade, advertising is now employed as an essential element in the function of making a sale of goods to the consumer and the advertising of a price is, consequently, directly related to and forms a part of the selling process. By laying stress upon price the advertiser hopes to persuade the prospective customer to make up his mind to purchase the article advertised before he enters the store. This is clearly recognized by all when, for example, a well-known electric iron or floor polisher is featured in an advertisement at a very low price. The same principle applies in the case of larger appliances when appeal is made to the public on a price basis. As C. S. Lewis of New Era Home Appliances Ltd. testified, "The price is it, the low is on it".

3. Conclusions

In December, 1951 Parliament enacted legislation forbidding a supplier to fix the resale price of an article or to attempt to induce any other person to observe a specified price in the resale of an article. In the opinion of the Commission the advertising of a price is an offer to sell at that price and consequently an attempt to control the price at which a retailer advertises an article is an attempt by indirect means to control the resale price of the article. The effect of such control, when secured, is to establish a common price in advertising for a group of dealers and this common price would become the basis of selling for such dealers. The public would thus be detrimentally affected by being deprived of the competition which Parliament had sought in enacting the legislation forbidding the practice of resale price maintenance. To disregard attempts by a manufacturer to control the prices advertised by his dealers would be to make a simple means available to any manufacturer who desired to circumvent the legislation and control resale prices of goods in the hands of the retailer. By the simple device of offering an attractive advertising allowance to retailers who were prepared to advertise at prices specified by the manufacturer control, for all practical purposes, could be secured over selling prices and the door would be opened wide for the defeat of the legislation with consequent disadvantage to the public.

To place this construction upon the legislation may appear, at first sight, to put a manufacturer desirous of promoting the sale of his product through co-operative advertising in an unexpected quandary. If a manufacturer is to make an allowance toward the cost of an advertisement he will naturally feel that he should contribute only to an advertisement that in his opinion, will be to the advantage of his business and that he should be able to withhold

payment toward the cost of any advertisement which he considers would be detrimental to his business. It was represented on behalf of Moffats Limited that the Company considered that advertisements featuring prices which it was not prepared to approve were disturbing to its dealer organization and did not assist in promoting the general business of the Company. Without questioning the sincerity with which these views were held by the management of the Company it must be pointed out that the furthering of the Company's interests must be sought through means which will not have the effect of defeating legislation which has been adopted by Parliament. While it was stated on behalf of Moffats Limited that there were objections by some trade groups when the legislation was introduced it was said that the principle of the amendment has now been generally accepted. Counsel for the Company further stated:

"But the legislation is here, and as Mr. Darroch has said, the legislation is accepted not only by Moffats organization but by industry at large; the objections that were made when the legislation was put forward were based upon a misconception."

The Commission believes that acceptance of the principle of the legislation necessarily requires that efforts should not be made to accomplish by indirect means what would clearly be repugnant to the legislation if attempted directly. In the opinion of the Commission a provision that an advertising allowance will be paid if a retailer advertises at prices specified by the supplier cannot avoid having the effect of an inducement to the retailer to observe such prices in the resale of the articles and is, therefore, contrary to the principle of the legislation. Further, the Commission believes the efforts of Moffats Limited in attempting to control the prices of its products in the hands of dealers went beyond the mere announcement of the conditions of its co-operative advertising plan and, as detailed earlier in this report, efforts were made in various ways, for example, by joint meetings of dealers, to induce dealers to follow a common policy with respect to advertising Moffat products at agreed prices.

One of the allegations made in the Statement of Evidence by the Director of Investigation and Research was that the withholding by Moffats Limited of contributions to the cost of advertising by dealers who conformed in all respects to the co-operative advertising plan of the Company, save only the observance of prices specified by Moffats Limited, constituted a discrimination in price within the meaning of Section 498A (now Section 412) of the Criminal Code. It was argued on behalf of Moffats Limited that payments made to a retailer by Moffats Limited under its co-operative advertising plan were in no sense discounts, allowances or price concessions within the meaning of Section 498A as related in any way to particular purchases of a retailer. While there are undoubtedly

forms of advertising allowances which would constitute a "discount, rebate, allowance, price concession or other advantage" within the meaning of the Section and which could be considered as being related to the purchase of the article so promoted, the Commission is of the opinion that in the circumstances as found in the present case the contributions of Moffats Limited under its co-operative advertising plan could not be considered as related to the sale of goods by the supplier to the dealer within the meaning of Section 498A (now Section 412). However, the Commission believes that the condition in the co-operative advertising plan relating to the advertised price and which is the basis of the allegation is improper because it constitutes an attempt to induce the observance of resale prices specified by the supplier.

In view of the conclusions reached by the Commission as to the nature and effects of the practices with respect to co-operative advertising engaged in by Moffats Limited the Commission does not consider it necessary to deal with the allegation made by the Director of Investigation and Research as to the responsibility for such practices of present or former officials or employees of the Company named in the Statement of Evidence.

(Sgd.) C. R. Smith

Chairman

(Sgd.) A. S. Whiteley

Member

(Sgd.) Guy Roberge

Member

Ottawa,
October 17, 1955

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